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MICHAEL RODAK, JR.,

IN THE

Supreme Court of the United States

October Term, 1972.

No. 72-408

VINCENT MALAVARCO,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

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In the

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No.

Vincent Malavarco,

Petitioner,

against

United States of America,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

Petitioner, Vincent Malavarco, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered on August 11, 1972.

Opinion.

The opinion of the Court of Appeals has not yet been reported. The opinion is appended hereto as an exhibit.

Jurisdiction.

The judgment of the Court of Appeals was entered on August 11, 1972. The jurisdiction of this court is invoked under Title 28 United States Code, §1254, subdivision (1).

Questions Presented.

The questions presented in this case are as follows:

1. Whether the independent (non-hearsay) evidence was sufficient to authorize the introduction into evidence against petitioner Malavarco of out of court statements made by other defendants out of the presence of the defendant Malavarco.

2. Whether hearsay declarations of one defendant may be used for the purpose of establishing the authority of that defendant to speak and act for a second defendant.

3. Whether the Court of Appeals, in using the hearsay statements of Variano and Rattenni to establish their authority to speak and act for the petitioner Malavarco, did not deny to Malavarco his right to confront witnesses against him granted by the Sixth Amendment, and did not deny him a fair trial in violation of the due process clause of the Fifth Amendment.

4. Whether there was insufficient independent evidence and whether the said insufficiency required the dismissal of the indictment at the close of the Government's case.

5. Whether considering all of the evidence there was not a total failure of proof at the close of the Government's case and at the close of the evidence.

6. Whether Malavarco should have been granted a separate trial.

7. Whether several portions of the charge were not contrary to law and whether they require reversal of the conviction.

8. Whether submission of the Eighth Count to the jury was not erroneous and whether that submission did not taint the jury's deliberations on the First Count to the prejudice of the defendant Malavarco?

9. Whether certain conduct on the part of the Government did not constitute error and require reversal of the judgment?

Constitutional Provisions Involved.

Amendment V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel for his defense.

Statutes Involved.

Title 18 U. S. C. §1952 provides:

"(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—

(1) distribute the proceeds of any unlawful activity; or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisonsed for not more than five years, or both.

(b) As used in this section 'unlawful activity' means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics, or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or (2) extortion, bribery, or arson in violation of the laws of the state in which committed or of the United States.

(c) Investigations of violations under this section involving liquor or narcotics shall be conducted under the supervision of the Secretary of the Treasury."

Title 18, U. S. C. §2 provides:

"(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal."

Statement of the Case.

The Indictment.

The indictment in the instant case was returned against twelve defendants and pleads fourteen counts. Only two counts name the defendant Malavarco, the first count and the eighth count. All counts are framed under Title 18 U. S. Code §§ 1952 and 2. The first count charges conspiracy to violate those sections, and the remaining thirteen counts charge substantive violations thereof.

The defendant Malavarco was found by the jury to be guilty of the first count and not guilty of the eighth count. At the opening of the trial the defendant Sabbatini was severed on motion of the Government, upon the stated ground that there was insufficient evidence against him to warrant a conviction. The defendant Sabbatini was also named in only the first and eighth counts of the indictment. Count eight deals with travel between New York and Puerto Rico alleged to have occurred on or about January 27, 1970. All of the other twelve substantive counts deal with travel between New York and New Jersey. The Government does not claim that the defendant Malavarco traveled in interstate commerce.

In the affidavit of Daniel P. Hollman in opposition to the defendant Malavarco's pre-trial motion in Item 6 (a) under "Bill of Particulars" Mr. Hollman states "The government does not claim that Malavarco actually travelled in interstate or foreign commerce."

The defendant Variano entered a plea of guilty to certain counts before trial and was not tried with the other defendants. The indictment was dismissed by the court during the trial as against the defendants Lattanzio, Boggia, Cohen and Parietti, in each case with the consent of the Government. The jury returned a verdict of "not guilty" against the defendant Alter. The defendant Malavarco was sentenced to imprisonment for one year on the finding of guilty on the conspiracy count.

The Record.

The record in this case before the Court of Appeals consisted of the original typewritten record of the District Court. This was the case since the Court of Appeals granted a motion by all defendants to dispense with the filing of an appendix. The basis of the motion was the fact the Southern District Court reporters furnished a transcript to the defendants, and filed a transcript as the original record both of which were not reproducible by photo-offset or any other process other than setting up this large record in type. This action by the reporters was deliberate and is stated by them to constitute their regular practice. The actual motion made by the defendants was made in the alternative, that is, that the court reporters be directed to furnish a clean and reproducible copy, and that time be allowed therefor, or that the appendix be waived. The Court of Appeals adopted the second alternative. For this reason no appendix was filed by the defendants in the Court of Ap-

peals. The record before this court is the original typewritten record of the District Court, together with additional proceedings in the Court of Appeals. References in this petition are to the original typewritten record.

Statement of Facts.

The defendant Malavarco was before his arrest a New York State Policeman with the rank of Senior Investigator, having served since his appointment on April 16, 1954, creditably and without stain. The indictment pleads that the conspiracy commenced on September 29, 1969, and continued until the date of the filing of the indictment, which was some time in April of 1971. During all times material to the indictment the defendant Malavarco was assigned to Troop K and was assigned to Hawthorne Barracks. Troop K has no jurisdiction over any part of Rockland County (756). Hawthorne Barracks has no jurisdiction over Mahopac, since the Brewster Station has jurisdiction over Putnam and upper Westchester, which covers Mahopac (757).

The conspiracy is alleged to have been hatched and carried into effect at a long series of meetings commencing on September 29, 1969, held at various restaurants, taverns and hotels. The defendant Malavarco was not present at any of these meetings.

The Government's case is built entirely around the testimony of Joseph Colligan, a New York State Trooper who claims to have, with purest motives, infiltrated the alleged conspiracy and received a series of substantial bribes from the defendant, Peter Variano. Colligan was present at all of the meetings above mentioned. His

testimony consists largely of statement made to him by the defendant Variano, none of them having been made in the presence of the defendant Malavarco. Variano did not testify at the trial.

The first word or deed which is claimed by the Government to comprise any part of the formation of the conspiracy was a telephone call by someone who described himself as "Mr. Thornton." "Mr. Thornton" made an appointment to meet Colligan in the parking lot of the Irish Pub in Haverstraw, New York. The person who appeared at that place was the defendant, Parietti. Parietti "requested that I (Colligan) make a meet to sit down and talk with Michael Roman regarding the gambling operation in Rockland County" (222, 223).

Pursuant to a subsequent phone call from Parietti, Colligan met the defendant Roman at Christy's New Town House, Nyack, New York, on October 1, 1969. Colligan testified among other things that Roman said, "that his organization had authorized him to come to see me (Colligan), to make me a proposition to offer me $500 per month to protect his organization's gambling places in *Rockland County*." Colligan's response was, according to his testimony, "I told him at this time that I didn't think $500 was a fair price for *Rockland County* since I knew it was worth much more than that * * *" (231). (Italics added.)

On October 8, 1969, Colligan testified he met with Variano and Roman at Christy's New Town House and that the following occurred: "After we had a drink he stated at that time he could offer me a thousand dollars to protect his gambling operation in *Rockland County*." Except for the addition of some fringe benefits, this was

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the exact proposition which Variano made and Colligan accepted (264 *et seq.*).

On October 15 Colligan met with Variano and Roman at the Las Vegas Restaurant which is in New Jersey a few dozen feet away from the New York—New Jersey boundary line (285 *et seq.*). This trip and subsequent trips from New York to the Las Vegas Restaurant furnish the basis for the charge of interstate travel between New York and New Jersey contained in all counts of the indictment except Count 8. Count 8 charges travel between New York and Puerto Rico. The only other count which mentions travel to Puerto Rico is count 1, the conspiracy count. Count 1 also mentions travel to Pennsylvania. No evidence was offered that anyone traveled to Pennsylvania, or that there was any agreement that anyone should travel to Pennsylvania. The only person claimed to be associated with Pennsylvania is Lattanzio and the indictment against him was dismissed upon the Government's consent.

There followed many meetings at the restaurants and hotels. The tabulation below sets forth in this order the date, the place, the dramatis personae and the page reference.

15/69	Las Vegas Restaurant	Colligan, Variano, Roman	(230 *et seq.*)
22/69	Las Vegas Restaurant	Colligan, Variano	(269 *et seq.*)
29/69	Las Vegas Restaurant	Colligan, Variano	(334 *et seq.*)
5/69	Las Vegas Restaurant	Colligan, Variano	(337 *et seq.*)
12/69	Las Vegas Restaurant	Colligan, Variano	
16/69	Hi Ho Casino	Colligan, Variano, Rattenni and 2 other white males	(345 *et seq.*)
19/69	Las Vegas Restaurant	Colligan, Variano, Rattenni	(348 *et seq.*)

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11/26/69	Las Vegas Restaurant	Colligan, Variano	(363 et
12/ 1/69	Wayside Inn	Colligan, Variano, Rattenni	(374 et
12/ 2/69	Kings Arms and Las Vegas Restaurant	Colligan, Variano, Rattenni	(380 et
12/17/69	Las Vegas Restaurant	Colligan, Variano	(391 et
12/22/69	Clarksville Inn	Colligan, Variano and 4 other persons not defendants	(404 et
12/24/69	Unnamed place near the Jersey line	Colligan, Variano	(700)
12/29/69	Las Vegas Restaurant Clarksville Inn Tappan Zee Motor Inn Westgate Inn	Colligan, Variano and 2 persons not defendants	(409 et
1/ 7/70	Las Vegas Restaurant	Colligan, Variano and 2 persons not defendants	(420 et
1/ 9/70	Tony & Rose's Restaurant	Colligan, Variano and 2 other persons	(426 et
1/14/70	Las Vegas Restaurant	Colligan, Variano	(440 et
1/19/70	Holiday Inn	Colligan, Variano and 1 person not a defendant	(445 et
1/23/70 1/31/70	Puerto Rico	Colligan, Variano, Cassino, Curico and persons not defendants	(463 et
2/ 4/70	Las Vegas Restaurant	Colligan, Rattenni, Variano	(448 et
2/11/70	Las Vegas Restaurant Peanut Grill	Colligan, Rattenni, Variano	(494 et
2/14/70	Kings Arms Restaurant	Colligan, Variano, Cassino	(503 et

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3/70	Las Vegas Restaurant	Colligan, Variano, Rattenni	(544)
5/70	Kings Arms Restaurant	Colligan, Variano, Rattenni	(545)
2/70	Kings Arms Restaurant China Fountain	Colligan, Variano, Cassino and Rattenni	(550 *et seq.*)

The defendant Malavarco was not present at any of the above meetings. Nor was he present at any of the outings (dinners, football games, ice shows, etc.) which were attended by other defendants. There is no evidence in the record that Malavarco knew anything of any of these meetings or outings.

The only times when Malavarco was seen to have been in the presence of any other defendants from September 29, 1969 to March 5, 1970, the date of his arrest, were four very brief encounters with Variano on December 16, 1969, December 19, 1969, February 20, 1970 and February 27, 1970. On each occasion it is entirely obvious that Variano sought out Malavarco. No Government witness was able to testify to a single word that was spoken by either Variano or Malavarco. No object of any kind changed hands on any of these four occasions. These encounters are discussed at length in Item 4 and Item 5 of Point I below.

Mr. Malavarco took the witness stand and gave an account of the four encounters with Variano which show him to be innocent of any wrongdoing, and of any intent to be involved in any wrongdoing and of any intent to be involved in any way with Variano or any other defendant. Malavarco's testimony as to what occurred at these encounters is entirely uncontradicted.

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Malavarco is not shown in the entire record to have uttered one word which has any relationship to the conspiracy, or to have performed a single act of any kind which can be related in any way to the conspiracy which is the subject of the indictment.

This petition as part of the argument which follows will either quote verbatim or refer to all references in the record to the petitioner Malavarco. This procedure is adopted because the argument as to the insufficiency of the evidence cannot be separated from a demonstration of meagerness of this record in its speech concerning Malavarco. Points I and IV will deal with such references as occur as part of the Government's case. Point V will deal with such references as are part of the defendant Malavarco's case.

All attorneys and the trial court agreed on the record that all motions, objections and exceptions made by any defendant were to be available to all defendants. This agreement was reaffirmed several times during the trial, and the court encouraged counsel to rely on this agreement and to refrain from separately stating each objection, etc.

Reasons for Granting the Writ.

The petitioner urges that the Court of Appeals in this case has decided certain of the questions raised in a way which is in conflict with the decisions of this court, and with the decisions of the other Courts of Appeals, and has decided important questions of federal law, and important federal constitutional questions, which have not been, but should be passed upon by this court. The questions raised by this petition are segregated in the points which follow.

POINT I.

The non-hearsay evidence in the case fails to show or raise any inference of complicity by defendant Malavarco in the conspiracy charged in the indictment. Therefore all hearsay statements by co-defendants should be stricken from the record and the indictment should be dismissed as against the defendant Malavarco.

Participation of a defendant in a conspiracy may never be shown by hearsay statements or admissions by an alleged co-conspirator, but may only be shown by independent proof based upon reasonable inferences drawn from his own acts, conduct, statements or declarations. In the absence of the establishment of such complicity of a non-declaring defendant there is no agency granted to any other defendant to perform any acts or make any declarations on behalf of the non-declaring defendant. Therefore in such case all hearsay statements must be stricken as against the non-declaring defendant and the indictment dismissed as against him.

Winchester and Partridge Manufacturing Co. v. Creary, 116 U. S. 161, 29 L. ed. 591;
Cuyler v. McCartney, 40 N. Y. 221;
Miller v. Barber, 66 N. Y. 558;
Lent v. Shear, 160 N. Y. 462;
United States v. Bentvena, 319 F. 2d 916 (2nd Cir. 1963);
Oltman v. Miller, 407 F. 2d 376;
Standard Oil Co. of California v. Moore, 251 F. 2d 188;
Flintkote Company v. Lysfjord, 246 F. 2d 368;
National Wrestling Alliance v. Myers, 325 F. 2d 768;
Ayers v. Pastime Amusement Co., 283 F. Supp. 773;
Cramer v. United States, 325 U. S. 1, 89 L. Ed. 1441;

Blaustein v. Pan American Petroleum and Transport Co., 174 Misc. 601, 21 N. Y. S. 2d 657, mod. 263 App. Div. 97, 31 N. Y. S. 2d 934, affd. 293 N. Y. 281;
United States v. Corallo, 413 F. 2d 1306;
United States v. Lev, 258 F. 2d 9.

This is a corollary of the theorem which is familiar to every lawyer and law student, that agency may not be proven by the declarations of the agent.

United States v. Consolidated Laundries Corp., 291 F. 2d 563 (2nd Cir. 1961);
Hirsch v. Badler, 3 A. D. 2d 921, 162 N. Y. S. 2d 720.

There will follow each item of non-hearsay evidence introduced by the prosecution which has any relationship to the defendant, Malavarco.

(1) (331 *et seq.*) Joseph Colligan said that in the middle of June, 1969 (a date which antedates the alleged conspiracy) he gave certain phone numbers to Vincent Malavarco certain telephones in the Mahopac area. Then Colligan testified that he telephoned Mr. Malavarco at Hawthorne and that Mr. Malavarco "stated he had gotten the location of the numbers, the houses that the telephone exchanges were located in, he had sat on these premises and did a surveillance of these locations for a one week period, and since there was no activity in the area he stopped the investigation."

(2) Mr. Colligan testified (371 *et seq.*) that he telephoned Mr. Malavarco on November 27, 1969, and the witness reported the conversation as follows:

"I told him that I had received information that Harry Creighton was operating on our side of the river

which would be the west side of the Hudson River in Rockland County, as well as in Westchester County. I gave Vincent Malavarco the telephone number and asked him if he could, you know get a location on this number and run an investigation on it. He said he would do this." (*Of the utmost importance is that Colligan did not say, to Malavarco that he was told about Creighton by Variano.*)

Colligan said the number was an Owens 9 number and said that he continued the conversation by asking Malavarco who Peter Variano was, and that "At this time Mr. Malavarco told me that some people say he is a bookmaker, some people say he is a big bookmaker, some people say he is a small bookmaker, some people say he operates strictly in Rockland County, but he never hears of him in Westchester County."

(3) (445) Mr. Colligan testified that on January 15, 1970 he received a telephone call at the Stony Point Station from Mr. Malavarco in which Mr. Malavarco said "he just arrested Harry Creighton for bookmaking" and "he got quite a bit of plays, which would be bets." Then when asked by the prosecutor "Q. Anything else?" Colligan answered "A. That's all sir." The last answer proved not to be a truthful answer. On cross examination Mr. Colligan testified that in the very same phone conversation Mr. Malavarco gave Mr. Colligan 30 telephone numbers in Rockland County most of which proved to be Variano's numbers (761, 762). Then on re-direct examination Mr. Colligan told the court a great deal more about this same phone conversation of January 15, 1970. He said at 964 "Yes sir. Mr. Malavarco advised me he arrested Harry Creighton and he was sending me some numbers which were gambling numbers in Rockland County. I asked him—he gave me some of the numbers

over the phone. One of them was Michael Roman's home phone number. I asked him why he was sending me these numbers and at the time his answer was that he had retrieved a book from Harry Creighton with a load of telephone numbers, that Captain Boland, who was his commanding officer in the Bureau of Criminal Investigation in Hawthorne, directed him to Xerox all these numbers and send them over the river to us, meaning the stations on the west side of the river."

(4) Captain Parmeter and Senior Investigator Herring testified to a surveillance at which they saw both Mr. Malavarco and Peter Variano at the San Roe Restaurant during the day, December 16, 1969 (1589 *et seq.*, 1512 *et seq.*) This is the only occasion on which either of them saw Mr. Malavarco in the presence of any person connected with the alleged conspiracy although they both conducted an extensive surveillance upon Mr. Malavarco and three other persons on each and every day, but one, during the period November 16, 1959 to December 16, 1969 (1589, 1514 *et seq.*). From the period November 16 to December 2nd, these officers expended an average of 10¾ hours per day on this investigation and Mr. Herring testified they continued to devote approximately the same number of hours per day to the investigation from December 3, 1969 to December 19, 1969, inclusive (1537-1551).

The two witnesses arrived at the San Roe Restaurant at either 12:05 or 12:15. Mr. Malavarco was already seated in the dining room at a table near the south wall of the dining room, where Mr. Malavarco had luncheon with four persons whom neither trooper could identify (1512, 1591). (Mr. Malavarco during his testimony identified them as persons who have no connection with this investigation or this case.) The dining room is a sepa-

rate room from the barroom and they are separated by a substantial wall made of walnut with glass windows approximately 3 feet square with sills 3 feet 6 inches above the floor. The barroom occupies the northerly part of the building and the dining room the southerly part. Persons seated at the main portion of the bar face the north wall and have their backs turned to the dining room (1600, 1554, 1556). The dining room was brilliantly illuminated and the barroom illuminated by "the kind of glamor lighting which is normal in a night club or bar" and the dining room was more brilliantly illuminated than the barroom (1557, 1558). At 12:15 the defendant, Rattenni entered the barroom and talked with two men named Mark and Sam about the sale of an automobile or automobile agency. Mr. Rattenni talked to no one connected with this case or this investigation. He sat at the long part of the bar facing the north wall and at 1:30 p.m. Mr. Rattenni left after telling the bartender, "Pete is supposed to meet me here. When he comes in, tell him I have gone to the Holiday Inn for a sauna" (1591, 1596, 1597, 1517).

At 1:45 p.m. Peter Variano entered the barroom for the first time (1592, 1513). Investigator Herring and Captain Parmeter tell very different stories, one from the other, about Variano's activities when he first entered the bar.

Herring said (1513):

> "Q. What happened when Peter Variano arrived? A. He sat at the bar and kept turning around, observing the table where Malavarco was, and Peter Variano got up from the bar and walked out to the lobby, and at the same time Malavarco got up and walked out to the lobby."

Parmeter on the other hand said that Peter Variano never sat down between the time he entered the bar and went into the lobby; he simply walked three quarters of the way down the bar and swung around and walked out (1592, 1601). Parmeter's testimony is an attempt, consistent with the Government's entire attitude in this case, to turn a chance encounter between Mr. Malavarco (who was present only to have luncheon with four business men) and Mr. Variano (who was at the restaurant to meet Mr. Rattenni) into a sinister, pre-arranged conference.

Variano went into the lobby and walked down a very narrow, steep spiral staircase in the lobby, which was immediately adjacent to the men's room, and on the way to the men's room, Variano walked down the staircase so that for an appreciable interval he was entirely hidden from the view of Herring and so that Parmeter was unable to say whether Variano descended 8 to 10 feet down the stairs. Parmeter said Variano there turned around and started talking to Malavarco. Herring said he "assumed" there was conversation between the two. At this point Mr. Malavarco was at the head of the stairway on the floor level near the men's room. Both men went into the men's room into which Parmeter followed them. He stood and washed his hands while Malavarco and Variano were standing at the urinals, as he said conversing in very low tones. Neither Herring nor Parmeter could hear anything that was said either at the stairwell or in the men's room, and neither could testify as to the nature of even one word that passed between Mr. Malavarco and Mr. Variano on December 16, 1970. Both men left the men's room, Variano to return to the barroom, Mr. Malavarco to rejoin his friends at the table with whom he subsequently left the restaurant (1592, 1593, 1604, 1605).

(5) F.B.I. Special Agent Currey testified that he saw Mr. Malavarco and Mr. Variano together on three occasions in the immediate vicinity of Mr. Malavarco's home on December 19, 1969, February 20, 1970 and February 27, 1970 (1270-1309). On all three occasions, Mr. Variano was waiting in a car outside Mr. Malavarco's home at a time when he would be leaving for work. *On each of the three occasions Mr. Variano was in a different car.* Mr. Currey said that on each occasion Mr. Malavarco sat briefly in Mr. Variano's car, but he also said that on each of the three occasions it was very cold. He said that on the first and second occasions Mr. Malavarco was in the car for a minute or two. On the third occasion he said Mr. Malavarco was in the car for four or five minutes, and then changed it to nine minutes. On none of the three occasions did Mr. Currey overhear any speech. Mr. Currey's surveillance of Mr. Malavarco began on December 19, 1969 and continued until at least February 27, 1970. He was engaged in surveillance on nine or ten occasions. He made notes of surviellances which were negative, but had destroyed those notes before trial.

(6) Agent Caffrey of the F.B.I. testified that he arrested Mr. Malavarco. He testified to oral statements which he said were made by Mr. Malavarco at the time of and immediately after the arrest (1609 *et seq.*). All of the statements were vigorous affirmances by Mr. Malavarco of his innocence, and his lack of knowledge of the entire matter. Mr. Caffrey attempted to convey to the jury that Mr. Malavarco said he did not know Mr. Variano, but this attempt was negated on cross examination by the following questions and answers (1624):

> "Q. Isn't that exact language that he used that he never met with Peter Variano, met with? A.

As far as I am concerned, Mr. Malavarco stated he never met with Peter Variano.

"Q. That's right. 'Met with' is the language I am asking you for, is that correct? A. That's my interpretation.

"Q. That's correct, isn't it? A. Yes sir."

Several agents on the stand, Mr. Colligan during his testimony, and the prosecutor during his questioning of the agents, repeatedly used the words "met with" to mean to confer in a meeting which is pre-arranged. Mr. Malavarco when he testified said that in "police parlance" "to meet with" means to meet pursuant to prearrangement. So all that Mr. Malavarco was saying was that he had not "met with" Mr. Variano pursuant to prearrangement, which was an entirely truthful statement.

Mr. Caffrey testified on cross examination at 1626 *et seq.* as follows:

"Q. Did he also tell you that it was his business to know all the gamblers? A. Something to that effect, yes.

"Q. Did he use these exact words, that it was his business to know all the gamblers? A. I believe so, yes.

"Mr. Malavarco also said he made many gambling arrests and made reports which are matter of official record."

"Q. Did he tell you that he was aware of Peter Variano and knew through the course of his own work that Peter Variano was a bookmaker? A. Yes he did.

"Q. He also told you he had never received any money, gifts, or gratuities from either Peter Variano or anyone else in connection with his work as

an investigator of gambling matters in Westchester County? A. Yes sir.

"Q. And he said something to the effect that he had made strenuous efforts on the job and now I am a bad guy, he said that, didn't he? A. That's correct, sir.

"Q. Then he said 'I don't know who set me up, but they did it because I couldn't be paid off' did he say that to you? A. Yes sir, he did.

"Q. Did he tell you that he had personally given some of Variano's bookmaking telephone numbers to the Manhattan D.A.'s office at least 5 years ago? A. That's correct, sir.

"Q. He said just a couple of weeks ago he had two of Variano's numbers people locked up and identified them as Betty Gibson and Harry Creighton, the latter being a negro male who Malavarco said was in Variano's policy bank and did he say 'You can look that up in the records'? A. He most certainly did, sir."

• • •

"Q. Did he also tell you that he was going to meet an informant Tom, Friday, March 6, 1970, in order to obtain two telephone numbers from Variano's operation? A. Yes, he did."

Significant on the matter of the Government's attitude toward the defendant, Malavarco, is the statement by Agent Currey on cross examination that he never checked out Mr. Malavarco's statements about the Creighton arrest, about the fact that Creighton was "in Variano's policy bank" and that he was to meet an informant on March 6, 1970, in order to obtain two telephone numbers from Variano's operation (1628).

The six items above detailed constitute the total of all independent (non-hearsay) evidence in the Government's case which has any connection with the defendant, Mal-

avarco. Each of the items taken individually and separately has no tendency to show that Mr. Malavarco was part of a conspiracy, or even knew about the existence of a conspiracy. When all six items are taken together, and considered as a unit, they compel a conclusion that the defendant, Malavarco, was both legally and morally innocent of any wrongdoing.

An observation is here appropriate with respect to footnote 21 on page 4388 of the Court of Appeals opinion which quotes and adopts the language "'Pieces of evidence must be viewed not in isolation but in conjunction' a seemingly innocent act, when viewed in the context of surrounding circumstances, may justify an inference of complicity." The point made by petitioner is that when all of the facts properly in evidence, are viewed together, they are even more consistent with innocence, and inconsistent with guilt, than when each separate fact is viewed separately. The next comment is footnote 21, "That the evidence of Malavarco's complicity is circumstantial is not fatal to the establishment of this complicity" is not antagonistic to petitioner's position. But the fact that all of the evidence against Malavarco is circumstantial calls into play a fundamental rule of law which, so far, has been ignored in this case. That rule is that where a case is based upon circumstantial evidence, the evidence must exclude every supposition or hypothesis except that of the guilt of the accused, and must exclude every possible hypothesis which is consistent with innocence.

Items 4 and 5 show that Mr. Malavarco was accosted by Mr. Variano briefly on four occasions, December 16, 1969, December 19, 1969, February 20, 1970 and February 27, 1970. On each of these four occasions no testimony was given by anyone as to what was said by either

Variano or Malavarco, since no one heard one word that was spoken. On each occasion Mr. Malavarco was at a place where he would have been in any event, whether Mr. Variano had been there or not, and whether Mr. Variano had ever been born or not. There is a compelling inference that Variano sought out Malavarco, and that Malavarco had no prior knowledge that he would do so. These four brief and scattered encounters are all that could be turned up by exhaustive surveillance by the State Police from November 16, 1969 to December 19, 1969, and by the F.B.I. from December 16, 1969 to at least February 27, 1970. These encounters have no tendency to show guilt. If unexplained encounters between policemen and gamblers had any tendency to show guilt, there would be no policemen left at large.

Casual and unexplained meetings by a defendant with a conspirator do not establish membership in the conspiracy on the part of that defendant.

> *United States v. Falcone*, 311 U. S. 205, 85 L. Ed. 128.

Clearly the government's proof showed only casual and unexplained encounters. Malavarco's testimony shows affirmatively that the four encounters were innocent of wrongful intent on his part, and were without prior knowledge or prearrangement. There is nothing in the record which has any tendency to controvert Malavarco's testimony on this matter.

Mere association with conspirators is an insufficient basis for a finding of participation.

United States v. Ragland, 375 F. 2d 471;
United States v. Euphemia, 261 F. 2d 44;
United States v. Stromberg, 268 F. 2d 356;
Causey v. United States, 352 F. 2d 203;
United States v. Hysohion, N.Y.L.J., Sept. 10, 1971.

Item 6 the alleged oral statement given to Caffrey is entirely exculpatory and is entirely consistent with Mr. Malavarco's testimony at trial. The Government attempted to interpret the statement so that it would seem that Mr. Malavarco said that he did not know Mr. Variano.

As has been seen, what was really said was that Mr. Malavarco had not "met with" Mr. Variano. That was, of course, a true statement. Let us, for the moment, assume that Mr. Malavarco had said that he did not know Mr. Variano. Even on that assumption, there would be no proof of guilt of any kind, and certainly no proof of membership in the conspiracy described in the indictment.

Item 1 has no tendency of any kind to show membership in any conspiracy. Mr. Malavarco is shown to have made a statement about an investigation conducted by him in Mahopac, some months before the commencement of the alleged conspiracy, and in a place outside Mr. Malavarco's jurisdiction. This evidence was admitted over the objection that it antedated the conspiracy by a matter of months (332). There is not one shred of evidence in the entire record having any tendency to show that Mr. Malavarco's statement that "since there was no activity in the area he stopped the investigation" was not a true statement. (Mr. Malavarco's testimony shows that the statement was true in every respect.) Item 1 shows only that Mr. Malavarco attempted to help

the Brewster substation with one of its problems, performed his duty, but after a week's effort, achieved no success, and returned to the performance of his own duties at Hawthorne, which was his own station. All of this occurred several months before the commencement of the alleged conspiracy.

Item 2 is equally innocuous. Mr. Colligan said that he gave Mr. Malavarco an Owens 9 number which he said was Creighton's number. Also Mr. Colligan said he asked Mr. Malavarco who Mr. Variano was and that he received an answer which was a perfectly correct answer, and consistent with truth and honesty.

Most important is the fact that the answer which Colligan said Malavarco gave him, did not remotely resemble the answer which Variano predicted Malavarco would give. Also important is that the answer attributed to Malavarco was calculated to stir Colligan into action against Variano in Rockland County, the only place where Colligan had jurisdiction to act.

At page 4384 of its opinion the Court of Appeals made a different use of this conversation when it said "but he [Malavarco] never hears of him in Westchester County even though Variano had estimated 80% of his business was in Westchester County." Variano's estimate of the source of his revenue is not binding upon Malavarco, and is no evidence of whether Malavarco had observed any Variano operation within Westchester County. Even more important the entire corrupt arrangement between Variano and Colligan was that bribes were to be paid to Colligan to protect Variano's operation *in Rockland County* (231, 265). The entire conspiracy, to which Malavarco is sought to be appended, is this conspiracy which all parties engraft upon Vari-

ano's Rockland operation. While the indictment mentions Westchester as well as Rockland, no witness testified to any agreement relating to Westchester County, and no evidence tends to establish any agreement relating to Westchester County. The reason for this is obvious. *During the years in question, Variano had no operation in Westchester County.* At the famous meeting of October 15, 1969, Variano told Colligan that 20 percent of his business was on the west side of the river, Rockland and Orange Counties, but he needed his offices there, his telephone there in order to operate, and he needed to protect that operation (290). It may well have been true that 80% of his business, of his customers, were in Westchester County. Among these customers were the numerous "half-sheet" writers who laid off their bets to Variano. Malavarco arrested many of those (including Creighton). But as he explained, they were not employees of Variano, were not part of Variano's "operation." Malavarco had no way of reaching or destroying Variano's business structure by anything he could do within Westchester County. Therefor if he said, as Colligan claimed, that he never hears of him in Westchester County, Malavarco was making a true statement. Most significant is the fact that on each of the two days prior to his arrest in March 1970 Malavarco advised his superiors, Captain Boland and Lt. Odell, "that the Variano operation was moving to Hartsdale the following Monday" (2554). The significance of this information was that Hartsdale was to be Variano's first point of re-entry into Westchester County since his removal therefrom at the time of his earlier arrest and imprisonment.

There is left then only Item 3, the arrest of Harry Creighton and the telephone conversation of January 15, 1970. This is the item which makes it abundantly clear

that Mr. Malavarco's conduct, throughout all of the six items was not only consistent with innocence, but was definitely and affirmatively innocent in character, and patently inconsistent with guilt.

A. Mr. Malavarco was of the firm belief that Creighton was connected with the Variano operation (Testimony of Agent Caffrey, *supra,* 1627, 1628).

B. Mr. Malavarco was *correct* in his belief that Creighton was connected with Variano—since he confiscated from Creighton a book with 30 telephone numbers in Rockland County, most of them being numbers of the Variano operation. One of the numbers was the home phone of the defendant, Roman, who, according to the prosecution, was a close associate of or lieutenant to Variano.

C. Mr. Malavarco promptly gave these telephone numbers to his superior, in writing, and promptly gave them over the telephone to Mr. Colligan in Rockland County, where the telephones were located.

D. If Mr. Malavarco had known about the conspiracy, and had in any way been in league with Variano, the last thing in the world he would have done was to arrest Creighton and then report these telephone numbers *through channels* to his superiors, *and* immediately turn them over to Colligan in Rockland County.

Therefore the following conclusions are inevitable (1) Mr. Malavarco is not shown to have known about any scheme to promote gambling; (2) Mr. Malavarco is not shown to have known about any scheme concerning bribes for protecting gambling; (3) Mr. Malavarco is not shown to have known about any scheme to travel in

interstate commerce for either of the above two purposes; (4) The government's evidence affirmatively prohibits any inference that he knew about any of the above.

It is important to note (1) that Mr. Malavarco is not shown to have received anything of value from anyone connected with this case; (2) he is not shown to have given anything of value to any person connected with this case; (3) he did not attend *any* of the many meetings among various defendants at which this conspiracy is alleged to have been hatched and promoted; (4) he is not shown to have met or to have known any of the defendants, except the other police officers, and Mr. Variano, all of whom he knew in the line of duty; (5) he is not shown to have traveled in interstate (or even in intrastate) commerce for any purpose connected with this conspiracy.

All that remains, when all of the window dressing is eliminated, are four brief encounters with Variano, totally unexplained as to purpose, totally unexplained as to what matters were discussed, if any.

It is most enlightening to examine the Prosecutor's argument in response to the Malavarco motion made at the close of the Government's case (2333, 2334). With respect to the non-hearsay evidence he said, "In that situation it would be expected that he would not be meeting with known gamblers at any particular time during the course of this conspiracy in the manner in which he did in front of his house • • •. I think it is fair to say he met many more times than three occasions • • •. On the basis of the way they met it is very, very, questionable what they are doing. Obviously it is to further a criminal purpose."

Three comments are necessary on the Government's stance.

1. The Government's position is that the purpose of the "meetings" is "questionable." This fails to meet any standard of proof applicable to a plaintiff in a criminal case or even in a civil case. Once it is admitted by such a plaintiff that such a purpose is "questionable," a motion to dismiss his case must be granted.

2. The prosecutor's statement that the "meetings" were held "to further a criminal purpose" (even if it were sustained by the evidence which it is not) would not save the day for him. There must be independent evidence, not of a general criminal purpose, but of an intent to promote the very identical conspiracy pleaded in the indictment.

3. The prosecutor's statement that there must have been other meetings goes entirely outside the record, and therefor accomplishes nothing on the Government's behalf. But even if we were permitted the luxury of speculation, here the record affirmatively prohibits any inference of the occurrence of any other encounters. There has already been explored the matter of the intensive surveillance by the State Police from November 16, 1969 through December 19, 1969, and Agent Curry's surveillance from December 19, 1969 through at least February 27, 1970. They saw Malavarco many times, but saw him in Variano's presence only on four occasions.

Is it not abundantly clear that the encounter at the San Roc was the result of the merest chance? Variano was there to meet Rattenni, and Malavarco, to meet four men totally unconnected with this case. Is it not equally clear that the subsequent three encounters were a uni-

lateral attempt by Variano to make some connection with Malavarco, once Malavarco was brought to mind by the encounter at the San Roc Restaurant? Certainly the front of Malavarco's home is the last place in the world where co-conspirators would hold a pre-arranged meeting.

That was a place which held the maximum risk of detection. It was also a place which entailed the greatest inconvenience to Variano. The whole record shows that he was a nocturnal creature, who liked to perform his business in restaurants and nightclubs, while reinforced by food and strong drink. That he went to Malavarco's home early on three frosty mornings is the best proof that he had no hold on Malavarco. Had Malavarco been on his payroll, he would have arranged a meeting at a safer, more convenient, and more convivial time and place. Also is it not strange that he met the others of his cohorts en masse, and that the only one he met privately was Malavarco? Is it not clear that it was important to Variano to keep from Malavarco any knowledge of his meetings with Colligan and the others? It is developed elsewhere in this paper that both Colligan and Variano went to very great lengths to keep from Malavarco any knowledge of the existence of the conspiracy.

Under the decided cases there is a total failure of proof. There must be proof that the defendant knew about the conspiracy and affirmative proof that he participated in the conspiracy and *intended to do so*, and of the scope of the agreement to participate in the conspiracy by each individual defendant and of the nature and degree of his participation.

United States v. Corallo, 413 F. 2d 1306;
United States v. Borelli, 336 F. 2d 376;
United States v. Falcone, 311 U. S. 205;

United States v. DeCalvacante, 440 F. 2d 1264;
United States v. Aviles, 274 F. 2d 179.

It is the burden of this point that there is not one single fact from which an inference can be drawn which tends to show that Malavarco joined a conspiracy or knew about any conspiracy. It is submitted therefore that no matter how low is the threshold the Government here failed to cross it.

The measure of proof, however, required of the Government is very substantial. Before hearsay declarations are admissible against a non-declarant there must be independent evidence in the record (non hearsay evidence) which establishes the non-declaring defendant's complicity by a fair preponderance of the evidence.

United States v. Calabro, New York Law Journal, 2nd Circuit, October 5, 1971.

Calabro distinguishes *United States v. Euphemia*, 261 F. 2d 44, and *United States v. Cantone*, 426 F. 2d 902, upon the ground that those cases set the standard applicable to the *quantum* of evidence necessary to require submission of a case to a jury. The court held that that *quantum* is higher than "a fair preponderance of the evidence" without saying how much higher. *Cantone* and *Euphemia* do, however, afford elucidation on that point. In *Cantone* the court reversed a conviction of one defendant stating, "We hold that the evidence on this issue was insufficient to establish beyond a reasonable doubt that Rosen had joined with Cantone in a conspiracy before July 28, 1964." *Euphemia* also requires that the evidence linking a defendant to other persons' wrongdoing must establish that link beyond a reasonable doubt. *United States v. Causey*, 352 F. 2d 203, is to the same effect holding that the Government's

evidence "must convince beyond a reasonable doubt that a conspiracy existed, that the defendant knew it, and did some act or thing to further or carry on that conspiracy." It would seem clear that as to each defendant the most important element is his own complicity, and that element must be proven beyond a reasonable doubt.

It is submitted that the last two paragraphs demonstrate that there is confusion within circuits and between and among the circuits on the matters there discussed.

POINT II.

The hearsay declarations of one defendant may not be used to any extent whatsoever for the purpose of establishing that that defendant was authorized to speak and act on behalf of a second defendant.

The rule that hearsay declarations of a conspirator are inadmissible against a second defendant, until that second defendant's membership in the conspiracy is separately established by independent evidence, is a necessary and inevitable consequence of the rule that the out-of-court declarations of an agent may not be used in any degree to establish his authority to act for a purported principal. That is the teaching of *Glasser v. United States*, 315 U. S. 60, 86 L. Ed. 680, which said, as part of its holding, "Otherwise hearsay would lift itself by its own bootstraps to the level of competent evidence."

This must necessarily be the law. Otherwise any human being who has the power of speech could successfully, by out-of-court statements, fasten criminal penalties upon any other human being on the face of the globe, whether

the two had ever met, or communicated in any way, or had any connection whatsoever, one with the other. It is submitted that the above rule of agency is even more necessary to the achievement of justice in the criminal law than in the law of contracts.

In the instant case Malavarco had never before his arrest seen or spoken to Rattenni (2540 *et seq.*). This evidence is totally uncontroverted by anything in the record. Yet the Court of Appeals used Rattenni's alleged out-of-court statements as a means of reinforcing a finding of Malavarco's membership in the conspiracy. So also it was with Variano's out-of-court declarations. Malavarco testified that he knew nothing concerning the conspiracy, and that not one word was mentioned concerning the conspiracy during his four brief encounters with Variano (2556, 2557, 2532-2540). There was not one word in the entire record which controverted Malavarco's testimony on these matters. Yet here again the Court of Appeals used Variano's hearsay declarations as a most substantial part of its finding that Malavarco was a member of the conspiracy. How substantial a part the hearsay played can be gleaned from the statement in the Court of Appeals opinion at page 4388, "While the evidence independent of the declarations of co-conspirators as to Malavarco's participation in the conspiracy is not overwhelming, it is sufficient." "Not overwhelming" means at the very least "not beyond a reasonable doubt."

It is a basic principle that the prosecution has the burden of proof (beyond a reasonable doubt) on each and every essential element of the crime charged.

People v. Brown, 25 N. Y. 2d 374, 306 N. Y. 2d 449, 254 N. E. 2d 755.

In the instant case the question of whether Malavarco by his own speech or act authorized any other defendant to speak or act on his behalf is certainly an essential element. In fact in the case of Malavarco it is the *only* essential element. There is not one word in the record to the effect that he performed one act, or said one word, in furtherance of the conspiracy. Therefore, the entire case against him stands or falls on whether he agreed to be bound by the acts of other persons. To allow that question of whether he granted authority to other persons to act for him, to be decided in whole or in part upon the basis of out-of-court declarations of those other persons, is the height of logical absurdity.

Courts have often remarked upon the dangers resident in the conspiracy statutes. This court has already stated that it views with disfavor attempts to broaden the already pervasive and wide-sweeping nets of conspiracy prosecutions.

> *Grunewald v. United States*, 353 U. S. 391, 77 S. Ct. 963, 1 L. Ed. 2d 931.

Those wide-sweeping nets will have been extended to alarming dimensions, if it is our law that a defendant who is not shown to have said anything, or to have done anything except having been seen in the presence of of another defendant on four occasions, can be convicted because other defendants make out-of-court statements, in his absence, in which his name is mentioned.

POINT III.

The Court of Appeals, in using the hearsay statements of Variano and Rattenni for the purpose of establishing their authority to speak and act for Malavarco, denied to Malavarco his right to confront witnesses against him granted by the Sixth Amendment, and denied him a fair trial in violation of the due process clause of the Fifth Amendment.

It was seen in the last point that the Court of Appeals found the evidence of Malavarco's complicity to be "not overwhelming." Despite that fact hearsay statements of others were used to sustain the conviction against him. It was also pointed out that the only real issue to be decided in the case of Malavarco was the question of whether he joined the conspiracy, and this authorized others to act and speak on his behalf. That only real issue was decided against Malavarco upon a *quantum* of proof less than guilt beyond a reasonable doubt. This is clear from the record. It is also very clear from the quoted portion of the Court of Appeals opinion.

Since the decision of *Matter of Winship*, 397 U. S. 358, 25 L. Ed. 2d 368, 90 S. Ct. 1068, it is clear that to convict an accused except upon proof by the Government of guilt beyond a reasonable doubt is a denial of due process of law.

The Court of Appeals also failed properly to take heed of the lessons of *Bruton v. United States*, 391 U. S. 123, 20 L. Ed. 2d 476, 88 S. Ct. 1620. It discussed only the use of Cassino's hearsay statements. It failed to address itself to justifying, within the standards set by *Bruton*, the use of the hearsay statements of Variano and Rattenni. *Bruton* concerns itself not only with the problem of severance. It concerns itself even more im-

portantly with the rule that one person's hearsay statement may not be admitted in evidence where it has any tendency to implicate any other person who is a defendant at the same trial. Limiting instructions are no longer of any value in avoiding the stern command of *Bruton.*

Nor is it of any consequence in this regard that the crime charged is conspiracy. The only importance of the concept "conspiracy" is that, if a defendant genuinely joins a conspiracy, he is by that act making the utterances of other co-conspirators his own utterances. From the moment the corrupt agreement is established by independent evidence, the utterances of those other conspirators become admissible as the utterances of the first conspirator. Thus this discussion does not create an exception to *Bruton* which continues the time honored rule that each man's own admissions and confessions are admissible against him. But *Bruton* insists sternly and absolutely that no man's admission or confession is admissible against another man.

The all-important step by which Malavarco at any time made anybody else's utterances his own is entirely missing from this record. The proof is entirely void of any evidence on that matter. Nonetheless the admissions of other persons, who on the record bore no relationship to Malavarco were admitted, and specifically admitted in evidence against Malavarco.

Under the plain ruling of *Bruton,* Malavarco was denied the right to confront and cross examine Variano, Rattenni and Cassino, in violation of his rights under the Sixth Amendment. As this court said in *Bruton,* "The unreliability of such evidence is intolerably compounded when the alleged accomplice, as here, does not testify and cannot be tested by cross examination." The chief

prejudice inflicted upon Malavarco (in fact, the whole case against Malavarco) resided in the hearsay statements of Variano. It will become clear in a later point how utterly impossible it would have been for Variano's testimony to have withstood cross examination.

POINT IV.

Even when the hearsay evidence is considered on the question of the defendant Malavarco's membership in the conspiracy (in violation of the principles explored in Point I hereof), the record is insufficient to raise any inference of Malavarco's complicity.

This point will now mention or quote every item of evidence touching the defendant, Malavarco, which was not mentioned in Point I, that is to say each and every declaration or admission by alleged members of the conspiracy in which Malavarco's name is mentioned as to which Colligan testified. In other words in Points I and IV there will have been mentioned every item of evidence presented by the government which mentions the defendant, Malavarco.

(7) Mr. Colligan testified that at his very first meeting with Mr. Variano, on October 8, 1969, Mr. Variano made the following statements:

(216) "He stated that he had a marriage with several state policemen. At this time he named the names of Eugene Curico, Vincent Malavarco and CC."

(261, 262) "He stated that for over the past year he had requested these three subjects to act as an intermediary for him to get to me in reference to his gambling operation. He stated that they all refused to do so

saying that I was an erratic person who might do something foolish."

Mr. Colligan on his *direct examination* then contradicted the above account of the very same conversation by saying it was only Curico and Malavarco whom Variano asked to bring Colligan into the operation (284).

(8) Mr. Colligan said (330, 331) that (referring to June of 1969) on October 15, 1969, Mr. Variano "stated that he was in touch wth Vincent Malavarco and requested that Vincent Malavarco let him proceed to use these telephones at these business establishments in Mahopac for a period of one week to cover his business expenses.

(9) Mr. Colligan testified that on November 19, 1969, the following was said (332):

> "Mr. Variano wanted to know why I didn't tell Mr. Sabbatini what was going on, Investigator Sabbatini what was going on, Investigator Sabbatini, what was going on in gambling, since he had Vincent Malavarco and allegedly Mr. Cassino contacting Louis Sabbatini to see what I was doing with gambling in Rockland County.
>
> "He said that they, Charles Cassino and Vincent Malavarco take care of Louis Sabbatini. I wanted to know how Vincent Malavarco or Charles Cassino took care of Louis Sabbatini, I said, 'Did they buy meals or a few drinks, and he said no.'
>
> "The Court: Who is he?
>
> "A. Mr. Variano said no, that they pay him money wise • • •."

Rattenni said "Vincent Malavarco was a very good boy, did things without making noise."

(10) Mr. Colligan said that the following occurred November 26, 1969 (368):

> "Mr. Variano took from his pocket a slip of paper containing a phone number. It was a phone number of the Westchester County area. He asked me, or told me, rather, that this telephone number allegedly belonged to a policy operator by the name of Harry Creighton. He said that Mr. Creighton was taking policy in the Orangeburg area of Rockland County and was cutting into his business. He asked me if I would forward—forwarded this number to Vincent Malavarco so that he might be able to do something on Harry Creighton. I told him I would get the number to Vincent Malavarco.
>
> "Q. Any further conversation concerning Malavarco? A. Yes sir. He told me that I should call Vincent Malavarco with this number, and while I was speaking to him he said, 'Ask him who Peter Variano is.'
>
> "He said, 'You will see how loyal he is to me at this time.'
>
> "He went on to state that he knew what Vincent Malavarco would say about him, that he was a small time bookmaker at one time, who was absorbed by other people, and was no longer in the business."

(11) Mr. Colligan said (374) that on December 1, 1969, "Mr. Variano told me that Vincent Malavarco had been successful in his investigation on Harry Creighton and as a result of his investigation had arrested Harry Creighton over in Westchester County." This testimony is incomprehensible and incredible as a matter of law. Mr. Colligan's own testimony (see item 3 above), and the entire record, establish that Mr. Creighton was not arrested on December 1, 1969, but on January 14, 1970, and that Mr. Colligan heard about the Creighton arrest on January 15, 1970, not from Mr. Variano, but directly from Mr. Malavarco himself.

It is submitted that is a deliberate attempt by Colligan to raise an inference that there was communication between Variano and Malavarco on or about December 1, 1969. Fortunately for Mr. Malavarco, and for the truth, there could not have been a conversation on December 1, 1969, relating a story about a Creighton arrest, which did not occur until January 14, 1970.

(12) Mr. Colligan testified on January 7, 1970 (422) that, "Mr. Variano stated that he didn't know what happened to Harry Creighton as yet as far as Vincent Malavarco's investigation on him."

(13) Mr. Colligan testified to the following incomprehensible fragment on page 431, referring to the meeting of January 9, 1970, "Mr. Variano went on about Harry Creighton stating that Vincent Malavarco had called him on January 8th, had called Mr. Variano on January 8th—no had—I am sorry Mr. Variano had knowledge from Vincent Malavarco that Vincent Malavarco had called me on January 8th to find out if" Colligan would tell him anything about Creighton's license plate number or anything else besides the phone number. This testimony is totally incomprehensible for three reasons: (1) Malavarco a policeman of 15 years experience knew how to get license plate numbers of a known individual from the motor vehicle bureau *instantaneously,* and would never make himself look foolish by asking for a registration number of another officer; (2) Colligan did not testify that Malavarco ever telephoned him about a license plate number, or for any other information about Creighton—thus if Colligan is to be believed, Variano was reporting to Colligan a history of a non-existent telephone call between Malavarco and Colligan; (3) If Variano had in fact spoken to Malavarco on January 8th there would have been no occasion for him to have

made the request in Item 14. Here is yet another example of Colligan seeking to create the appearance of communication between Malavarco and Variano where none in fact existed.

(14) Mr. Colligan testified (440) that on January 14, 1970, "Mr. Variano said to me, 'Will you call Vincent Malavarco to find out what he is doing with Harry Creighton' I said I would do that for him."

(15) Mr. Colligan testified (448) that on January 21, 1970, "Peter Variano said to me that he had contacted Vincent Malavarco and told him to keep in touch with Louis Sabbatini at the Stony Point State Police Barracks while we were gone to Puerto Rico, to ascertain if Sabbatini was doing any gambling investigations while I was gone. I told him this was a foolish thing—I told Peter Variano that this was a foolish thing to do since I would leave orders on what was to be done before I left."

Mr. Colligan referred to this alleged conversation again at page 470 where he said that Mr. Variano, during a conversation which occurred in Puerto Rico on January 27, 1970, said he phoned Mr. Malavarco not on January 21st, but on January 23rd. This testimony is as follows:

> "Mr. Variano said to me that on January 23, 1970 that he telephoned Vincent Malavarco and asked Vincent Malavarco to keep in contact with Louis Sabbatini, State Police, Stony Point Station, while he was in Puerto Rico to see what we might be doing in Rockland County with reference to gambling. I asked him at this time again what did Louis Sabbatini get out of giving information out, and Mr. Variano said to me—I said to Mr. Variano, rather, that he just probably gets dinner

and drinks and Mr. Variano stated to me at this time he pays Mr. Malavarco an x number of dollars and that Mr. Malavarco takes care of Louis Sabbatini and Eugene Curico out of this money."

"He said that he *believed* that Vincent Malavarco gave Sabbatini a hundred dollars a month and Eugene Curico a hundred dollars per week." (Italics added.)

(16) Mr. Colligan testified (479 *et seq.*) that the following conversations also took place in Puerto Rico:

Colligan said "I didn't know what Mr. Sabbatini was up to at this time, and what he was trying to pull on me in regard to gambling in Rockland County. Mr. Cassino said he couldn't understand—he said to me that he couldn't understand Sabbatini's actions at this time either since he paid Sabbatini $100 a month for any information that he was giving out on gambling to Vincent Malavarco."

"Mr. Cassino said to me he met Louis Sabbatini approximately once a month on a Monday morning in the area of the Peanut Grill • • •."

(480) When Curico walked away "Charles Cassino said to me that—regarding Louis Sabbatini, that he paid Louis Sabbatini the $100 off the top of Curico's money."

(497) "Peter Variano said to me again, 'What is wrong with Louis Sabbatini?' I again said to Mr. Variano that I did not know, that 'since you told me that Charles Cassino pays him and Vincent Malavarco pays him, I don't know what is wrong with him.'"

(17) Mr. Colligan testified to the following conversations which took place on February 12, 14 and 25th, respectively.

(Feb. 12. 502) Colligan called Charles Cassino and said, "I have information that Louis Sabbatini wants to proceed with a raid on the apartment at 150A West Eckerson Road."

I said to Charles Cassino, "Will you take care of it, and I will take care of Sabbatini?"

Later same day Charles Cassino called and said situation was taken care of.

(Feb. 14. 504) "Mr. Variano thanked me for making the call on February 12th to Charles Cassino. Mr. Variano said to me that as a result of the call they got the people out of West Eckerson Road before anything could happen."

(Feb. 14. 529) Mr. Variano said, "What's the matter with Louis Sabbatini? He is trying to hurt someone." I said to Mr. Variano that, "Charles Cassino and Vincent Malavarco pay him for you and if they pay him why is he doing this? I don't understand it either."

(Feb. 25. 550) Mr. Curico said to Mr. Colligan that, "he didn't know what was the matter with Louis Sabbatini."

A. Certain of the hearsay evidence is strongly exculpatory and prohibits any inference of guilt on the part of the defendant, Malavarco.

It will be recalled that the four occasions on which Mr. Variano accosted Mr. Malavarco were on December 16, 1969 (San Roc), December 19, 1969, February 20, 1970, and February 27, 1970.

It has been seen that the independent evidence affirmatively prohibits any inference of complicity from these four encounters. The hearsay evidence also strongly prohibits any such an inference.

Items 12 and 14 above indicate that Mr. Variano was forced to rely upon Mr. Colligan to ask Mr. Malavarco about the Creighton investigation because he was unable to obtain any information about that matter on his own. By all accounts, both the Government's and Mr. Malvarco's, the Creighton investigation had been under way for a long time on December 16, 1969, when Mr. Variano accosted Mr. Malavarco at the San Roc, and on December 19, 1969, when he accosted Mr. Malavarco in front of his home. Mr. Variano did not ask Mr. Malavarco about the Creighton investigation. It is clear that he did not *dare* to ask Mr. Malavarco about that investigation. The only conclusion to be drawn is that there was no agreement or understanding of any kind between Mr. Malavarco and Mr. Variano. This is consistent with the fact that Mr. Variano did not even dare to give Mr. Malavarco Mr. Creighton's phone number in the first place.

Mr. Colligan shared the conclusion just set out and so admitted on cross examination.

Mr. Colligan said that Variano asked Colligan to give Malavarco the Creighton phone number because he, Variano, felt if he gave him the number, he would also have to disclose to Malavarco the source from which he, Variano, had gotten the number (596-598). (What better proof could there be that Malavarco was not on terms of confidence with Variano and had no part in the conspiracy? If Malavarco were part of the conspiracy, Variano would have had no hesitancy in disclosing the source of his information.)

With respect to Mr. Variano's hesitancy to give the number to Mr. Malavarco directly, Mr. Colligan made the following answers:

> (598) "Q. So at that point you had no doubt as to—it didn't cause you to have a doubt as to whether he was correct when he said he had Mr. Malavarco on the payroll, right? A. Some doubt.
> "Q. It did cause some doubt, right? (599) A. Some doubt, yes, sir."

The above answers, given concerning Mr. Colligan's doubts as to Mr. Malavarco's complicity, related to Mr. Colligan's state of mind on November 26, 1969, and November 27, 1969. Then he was taken down to January, 1970, and asked about Mr. Variano's reluctance to ask Mr. Malavarco about the Creighton investigation. On page 602 he made the following answer:

> "Q. Didn't that indicate that he (Variano) wasn't having any contact with Mr. Malavarco? A. At that time, yes, sir."

Mr. Colligan said further that he did wonder "a bit" whether Mr. Malavarco was on the payroll (602, 603), and then on 604 gave the following answer:

> "Q. So for two months then since you gave the number you felt that he (Variano) was afraid to get in touch with this man who was on his payroll (Malavarco), is that right? A. Somewhat right."

We have seen that Variano declined to take Malavarco into his confidence, and feared to give him any sensitive information. This statement applies with equal force to Colligan. In item 2 (Point I) Colligan claims to have given the Creighton number to Mr. Malavarco. In item 10 Mr. Colligan said he received the information concerning Creighton's number from Variano, and that he

was requested to give this number to Vincent Malavarco, so that Malavarco would arrest Creighton. Colligan was very careful not to tell Malavarco the source of his information (Variano), and was very careful not to tell Malavarco that this arrest was to be an accommodation to Variano. In fact, at no time, during the entire tedious tale, did Colligan ever let Malavarco know that he, Colligan, was in league with Variano. Nor did he dare to even hint that he had heard from Variano, or anyone else, that Malavarco was in league with Variano. It is evident that both Variano and Colligan were afraid to take Malavarco into their confidence. This is the best proof that Malavarco was in league with no one.

There is yet further proof that Colligan knew that Malavarco was not part of the conspiracy. We have seen that on January 7, 1970, and January 14, 1970, Variano said he knew nothing about the Creighton investigation and asked Colligan to call Malavarco and ask him about its progress. Despite his promise to Mr. Variano that he would do so, he never called Mr. Malavarco about this request.

On February 25, 1970, Mr. Colligan said to Mr. Cassino and Mr. Curico:

> "Vincent Malavarco should be straightened out since he sent me a list of phone numbers most of them being Peter Variano's numbers. I want to get ahold of Vincent Malavarco to find out why he put me in a barrel by giving me those numbers."

Here again, he never communicated with Mr. Malavarco, "to straighten him out," or to find out why Mr. Malavarco "put me (Colligan) in a barrel" by doing things which injured Variano's operation. Is this not the best proof that Colligan too feared to give any information to

Malavarco, on the simple basis that Mr. Malavarco is an honest officer?

There is another aspect of this incident which undermines Colligan's story. According to Colligan, Variano was angry at Creighton, not because he was operating in Mount Vernon, but because Creighton was operating "in the Orangeburg area of Rockland County" and was there "cutting into his business" (364 *et seq.*). The Orangeburg area of Rockland County is solely within the jurisdiction of the Stony Point Station, to wit, under the control of Colligan. It is difficult to imagine why a call to Malavarco should have been necessary. The simplest and most direct procedure was for Colligan to knock out Creighton and his Orangeburg operation, and eliminate competition, and not to call Malavarco to knock out an operation in Mount Vernon which, according to Colligan, was not competing with Variano.

This brings up another curious aspect of this prosecution. The Government has attempted to blur its outlines, by somehow dragging Westchester County into the corrupt agreement. One can only assume that this is because Malavarco is stationed in Westchester County, and has no jurisdiction whatever in Rockland County. The corrupt agreement was set forth very succinctly by Mr. Colligan at the outset. He said that on October 1, 1969, Roman was authorized to offer Colligan "500 per month to protect his organization in *Rockland County*" and Colligan said that he didn't think "$500 was a fair price for *Rockland County*" (231). He said further that on October 8, 1969, Variano said: "he could offer me a thousand dollars a month to protect his gambling operation in *Rockland County*." (Italics added.) Except for the fact that Mr. Variano, immediately afterwards, offered, additionally, certain fringe benefits, this is the precise proposition accepted by Colligan (265).

Then it is clear that this corrupt agreement related to Rockland alone. It is an absurdity to suppose that Variano would need Malavarco, who was stationed at Hawthorne, and resided in Dobbs Ferry, to protect him in Rockland County. Even if Variano required protection in Westchester, a fact which may not be inferred from this record, it is absurd that he should have turned to Malavarco. Malavarco was one of only seven investigators in the State Police at Hawthorne (2552). Westchester has over 2,200 municipal police, a large Sheriff's force of investigators, and a large force of District Attorney's detectives (2551, 2552). Mr. Colligan freely admitted that the State Police was "not the major investigative agency in Westchester County" and that "the various localities and the Sheriff's office and the District Attorney's office were perfectly capable of doing their own investigative work, and in fact they do their own" (760). On the other hand, in Rockland County everyone calls upon the State Police to do the investigative work (755).

These answers invoke two conclusions (1) it would have been absurd for Variano to feel he was safe in Westchester County if one State Policeman were co-operating (2) there is a reason why he felt safe in Rockland County, and moved there from his ancient Westchester operation. In Rockland one strategically placed State Policeman could afford him a reasonable degree of security.

It is a curious thing that the only functions or duties imposed upon Mr. Malavarco by the hearsay testimony, relate either to paying Mr. Sabbatini, or keeping tabs on Mr. Sabbatini (see items 9 and 15, *supra*). The hearsay testimony shows affirmatively that Mr. Sabbatini was aggressively hostile to the objectives of this alleged conspiracy (see items 16 and 17). Everyone was very dis-

satisfied with Sabbatini's actions which were plainly aimed at sabotaging Variano's operations. Colligan and his cohorts were as afraid of enlisting Sabbatini's cooperation as they were of enlisting Malavarco's cooperation. Let us examine, for example, the matter of the proposed raid by Sabbatini on Variano's operation at 150A West Eckerson Road (502-504). Colligan did not tell his subordinate, Sabbatini, to cancel the raid. It is obvious that he did not dare to do so, and that therefor Variano had no control of Sabbatini. Instead he made a phone call for the purpose of having Mr. Variano's minions evacuate the apartment on West Eckerson Road, so that Mr. Sabbatini's raid would "come up dry." It was not Mr. Sabbatini's fault that his raid was thwarted. He was betrayed, *without his knowledge*, by Colligan's having arranged a "tip-off" phone call. Mr. Sabbatini was obviously no part of this conspiracy, and this the Government recognized by severing as to him at the very opening of the trial. Mr. Malavarco's only alleged function was to keep watch on Sabbatini and to pay him. If Mr. Sabbatini had no part in the conspiracy, the whole hearsay edifice as to Malavarco tumbles as well, since he is left with no conceivable function, and with no conceivable intent, so far as this conspiracy is concerned.

The entire matter of Sabbatini's alleged membership in the conspiracy and Malavarco's alleged relationship to Sabbatini, was exposed on cross examination for what it really is, a crazy quilt composed of incongruous nonsense.

It must be recalled that there were only three jobs which the hearsay testimony assigned to Malavarco. (1) In item 9 above it appears that Colligan, at Stony Point, was to give gambling information to Sabbatini at Stony Point, who was to give it to Cassino and Mala-

varco, at New York and Hawthorne respectively, who were to give it back to its original source in Rockland County, to wit, Colligan and/or Variano. (This story is ridiculous on its face and needs no further argument, but was justly dealt with on cross as will be seen.) (2) Malavarco at Hawthorne was to watch over Sabbatini at Stony Point during the absence of Colligan and Company in Puerto Rico. Colligan himself said this was a foolish thing to do since it was he, Colligan, who was in control of Sabbatini. The jury clearly rejected this story since they acquitted Malavarco on Count 8. (3) Malavarco was paid "x number of dollars" out of which he paid Sabbatini. (A curious fact is that Malavarco is unique in this case that nowhere is there any mention of any amount of money, only "x." The powers of invention of Messrs. Variano and Colligan seem to have here run out at this point.)

It should be mentioned that nowhere, even in the hearsay testimony, is there one single word tending to show that Mr. Malavarco by word, deed or even gesture, ever assented to doing one thing on behalf of Variano, or any other defendant. All there is is hearsay testimony as to what Mr. Variano desired or requested, and not one gesture of assent by Mr. Malavarco. One cannot become a member of a conspiracy by failing totally to respond to a request of a conspirator, either by word or deed. Cases so holding were cited in Point I.

It was promised above that the cross examination on the above matters would be explored. On page 604 (and 332) Mr. Colligan said that Mr. Variano asked Mr. Colligan why he wasn't giving gambling information to Sab-

batini on Variano's gambling operation. Then at 605 occurs the following:

> 605. "Q. And the reason he was concerned was that Mr. Sabbatini was not turning over any information about gambling to Mr. Cassino and to Malavarco who in return would pass the information back to Mr. Variano, is that correct? A. Yes, sir."

At page 608 Mr. Colligan's attention was called to his report of January 19, 1970, in which he said:

> "This I do not understand. In one breath Variano tells me that he would not know Sabbatini if he fell over him, since he has not seen him in three years, and he now states that Vincent Malavarco knows he is friendly with Sabbatini."

Thereafter Mr. Colligan was asked the following questions and made the following answers:

> "Q. Did that indicate to you that Mr. Variano was making unreliable statements about Mr. Malavarco? A. At this time, yes.
> "Q. That was January 19, 1970, right? A. Yes.
> "Q. Doesn't that sort of contradict what you told us a few minutes ago, Lieutenant, as to what the relationship was between Mr. Malavarco and Mr. Variano and Mr. Sabbatini? Didn't you tell us a few minutes ago that the reason Mr. Variano wanted you to give information to Sabbatini was so he could turn it over to Mr. Malavarco and in that way Malavarco wouldn't get suspicious that you are on the payroll? A. That's right."

One cannot help wondering, if Malavarco had in fact been a member of the conspiracy, as to why it would have been necessary to hide from Malavarco Colligan's membership. If Malavarco had been a member it would have endangered neither Variano nor Colligan, to disclose

to him that Colligan was also a member. Furthermore, it would have facilitated the operation of the alleged conspiracy, and furthered Colligan's investigation thereof. *If Colligan had really suspected Malavarco of complicity in the conspiracy, he would have taken him into his confidence for the express purpose of achieving evidence against Malavarco.*

At 949-952 there is cross examination concerning the various hearsay conversations on the subject of the alleged payment to Sabbatini and at 952 Colligan testified that the conversations are "irreconcilable."

The portion of Item 10 which has not already been discussed is strongly exculpatory. Variano is alleged to have asked Colligan to ask Malavarco who Variano is and to have said, "You will see how loyal he is to me at this time." Colligan then said, "He went on to state that he knew what Vincent Malavarco would say about him, that he was a small-time bookmaker at one time, who was absorbed by other people and was no longer in the business."

When Colligan asked Mr. Malavarco who Peter Variano is, he said he got a completely different answer, which bore no resemblance to the above, and which was calculated to spur a Rockland County State Policeman into instituting immediate and vigorous investigation of Peter Variano. Colligan said Malavarco's response to this question was:

> "A. At this time Mr. Malavarco told me that some people say he is a bookmaker, some people say he is a big bookmaker, some people say he is a small bookmaker, some people say he operates strictly in Rockland County, but he never hears of him in Westchester County."

B. The hearsay testimony is without probative force (1) because it is given by Colligan who testified falsely on a number of occasions at the trial, and whose testimony was replete with contradictions, errors, and inaccuracies (2) because it reported hearsay statements by Variano, a convicted and self confessed felon who was intoxicated on most if not all occasions when he made the statements attributed to him (3) because the hearsay statements in the main would have been inadmissible even had Mr. Variano taken the witness stand for the purpose of making the same statements under oath (4) because Colligan, the only witness who testified to the making of the hearsay statements, did not himself believe them to be true statements.

(1) Colligan to our knowledge testified falsely when he said that the exhibits which were offered in evidence were all of the gifts he received from Variano. He deliberately omitted the color television, and about $397 worth of clothing. He said his surveillance team watched him every time he met with Variano. He carefully and deliberately omitted December 24, 1969 (697-704, 2175-2196). As to the contradictions, errors, and absurdities in his testimony, many have already been pointed out, many will be pointed out below, and many will escape comment here simply for lack of space.

(2) Mr. Variano is, of course, a self-confessed felon. Mr. Colligan reported an amount of drinking of intoxicants at virtually every meeting, which strikes this briefer with astonishment. He freely testified to the number of occasions when Mr. Variano was strongly under the influence of alcohol or just plain drunk. On every occasion when Colligan met with Variano (with the possible exception of the mysterious meeting of December 24, 1969) the first order of business was resort to excessive conviviality. The matter of Mr. Variano's drinking was explored on cross examination at pages 910-940. Under

such circumstances, to accord any weight to Mr. Variano's extravagant bragging can result only in a miscarriage of justice.

(3) In Item 7 Mr. Variano is quoted as stating he has a "marriage" with several state policemen one of whom was Malavarco. Had he taken the stand this testimony would have been excluded as a conclusion. Also in this item Variano said he asked the policemen to bring Colligan into his operation, but they refused. If this material has any effect at all it is toward exculpating the policemen.

In Item 8 Mr. Variano is quoted as saying he requested Mr. Malavarco to let him operate in Mahopac for one week in June of 1969. Assuming that Variano made such a request, the record fails to disclose that Mr. Malavarco ever made any answer to this request, or was under a duty to give Variano an answer, or that the circumstances were such as require an answer. Policemen are regularly subject to demands and requests which they simply ignore. Such silence cannot be construed as assent and such silence is never an admission or assent.

The United States Court of Appeals, in the Second Circuit, in the case of *U. S. v. Gross,* 275 F. 2d 816, certiorari denied 80 S. Ct. 602—has adopted the statement of *Wigmore on Evidence* to the following effect, "Failure to deny the statements of others is admissible only when no other explanation is equally consistent with silence; and there is always another explanation—namely ignorance or dissent—unless circumstances are such that a dissent would in ordinary experience have been expressed if the communication had not been correct."

In Item 9 only a conclusory statement is attributed to Variano "that he had Vincent Malavarco and allegedly

Mr. Cassino contacting Louis Sabbatini." This is a mere conclusory statement and relates no facts as to which Variano was himself a witness and to which he could have testified on the stand. The same objection would apply to the statement "they pay him money wise" (372).

In Item 15 Colligan said that Variano said "he had contacted Vincent Malavarco and told him to keep in touch with Louis Sabbatini at the Stony Point Police Barracks while we were going to Puerto Rico." Here again there is no suggestion of an answer by Malavarco. We cannot spell out assent to a corrupt agreement through silence under these circumstances.

Also in Item 15 Colligan quotes Variano as saying "that he pays Mr. Malavarco an x number of dollars." This is too vague as to amount, as to time, as to circumstances, as to period involved, to have withstood objection, had Mr. Variano taken the stand. The remainder of the statement attributed to Variano as to whom Mr. Malavarco paid would be totally inadmissible because it is matter as to which Variano himself had no personal knowledge.

In short, even aside from the matter discussed in Point I, that all the hearsay is inadmissible as hearsay which does not bind Malavarco, there is yet another reason why this hearsay is inadmissible. It is evidence which could not have survived objection, upon other grounds, even if defendant had been foolish enough to waive the objection explored in Point I. Had Mr. Variano been sworn as a witness he would not have been permitted to testify to opinions, conclusions, vague statements and as to matters outside his personal knowledge, and as to unanswered requests. It is shocking to suggest that evidence which would be inadmissible if adduced from a duly sworn witness, who is subject to cross examination,

becomes admissible if it is a quotation of an unsworn statement made by a third party out of court, a third party who is never subjected to cross examination.

(4) There have already been mentioned a number of instances in which Mr. Colligan said he felt Mr. Variano was not reliable in his statements concerning Mr. Malavarco. There are many more such instances in the record.

At page 582 Mr. Colligan said that when Variano mentioned the State Policemen including Malavarco, he might have been giving him decoys to throw him off the track, and also thought he might have been trying to impress him by showing the connections he had.

At 585 Colligan said that the matter of F.B.I. Agent Ed Taylor made Colligan worry about the reliability of Variano's statements as to who was on his payroll.

At 590 the following occurs:

> "Q. After you had been meeting with Mr. Variano for a number of times and Mr. Variano would tell you somebody was dishonest who was in public office, you wouldn't accept that? A. Not really.
> "Q. You wouldn't believe Mr. Variano, right? A. Sometimes I did, sometimes I didn't.
> "Q. Did you testify as follows in the grand jury under oath, 'They,' meaning Mr. Variano and others, 'throw names around and I didn't know how true it was that these guys are honest or dishonest,' right? A. Yes, sir."

On the same page Mr. Colligan said again that he speculated that Variano threw names around in order to impress Colligan.

It is clear, therefore, that Mr. Colligan had no faith in the reliability of Variano's statements about public officials generally, and had doubts about the truthfulness of Variano's statements about Malavarco specifically. The court and jury had no chance to view Variano when he uttered the hearsay statements. They had no chance to appraise him for drunkenness or sobriety, or equally important, his demeanor, his forthrightness, or lack of it, and all of the other facts which go into making the crucial judgment on Variano's credibility. The only one who had the advantage of viewing Variano was Colligan, and he was very far from convinced that Variano was telling the truth about Malavarco. Under such circumstances, it is submitted there is reasonable doubt *as a matter of law*.

POINT V.

Upon the entire record there is insufficient evidence to warrant submission to a jury or to support a finding of guilty and the finding of guilty against Malavarco upon the first count of the indictment was against the weight of the evidence.

The defendant, Malavarco, took the witness stand and testified on his own behalf and called witnesses. He was forthright in his testimony which was consistent and logical, both on direct and cross examination. He said he first met Variano when Variano was someone's guest at his boat club. Variano had just been arrested at Tappan Hill for gambling. Variano sent drinks over to Mr. Malavarco's table. Mr. Malavarco complained to the Commodore of the boat club; as a result Variano was asked to leave the premises (2523). After Variano had served his sentence he approached Malavarco, and on one occasion, without any solicitation by Malavarco, fur-

nished information which Malavarco developed, and, on the basis of which, subsequently made an arrest (2524-2526). It thereafter came to Mr. Malavarco's attention that Variano was boasting of having a connection with Malavarco, and Malavarco then told Variano to stay away from him, and that he would not tolerate Variano bragging about having Malavarco as a pawn (2527-2529). Two years elapsed during which there was no contact between the two until the encounter at the San Roe Restaurant.

Mr. Malavarco explained what the Government was unable to elucidate, the nature of the conversation at the four encounters with Variano. Looked at in context Variano's conversation seems to be a timid attempt to establish a friendly relationship with Malavarco. His attempts were met with a stern rebuff. Perhaps, if Mr. Malavarco had been more friendly, or, rather, less unfriendly, Variano would have tried to make good his earlier boasts, and have tried to establish, for the first time, some sort of rapport with Mr. Malavarco. Suffice it to say nothing of any consequence occurred (2532-2540).

The matter of the Creighton arrest was elucidated by Mr. Malavarco's testimony, Lieutenant Bradford's testimony, Mount Vernon Police records (Defendant Malavarco's Exhibit Y) (2461-2470, 2480-2485). The testimony and the police record show that Creighton's phone number and address first came to the attention of Mr. Malavarco and the Mount Vernon Police as being used for gambling on October 8, 1968. It was Malavarco who first called this matter to the attention of the Mount Vernon Police. The investigation was renewed in October, 1969. Mr. Malavarco's testimony shows that it was reinstituted at that time because he saw a grey Cadillac

with a Rockland County registration in the vicinity of the Creighton address. He knew that Creighton was employed in Orangeburg, Rockland County, and concluded that the Cadillac was Creighton's, and that there must be activity at Creighton's Mount Vernon address. He then began the surveillance which resulted in Creighton's arrest on January 14, 1970. Mr. Malavarco denied that Mr. Colligan ever called him on November 27, 1969, and gave him the Creighton number. When Malavarco spoke to Colligan on January 15, 1970, after the Creighton arrest, Colligan claimed to have given Malavarco the Creighton number, and Mr. Malavarco said, "Joe, you did not give me that number," or words to that effect.

Mr. Malavarco testified that before his arrest he had never met any defendant, except Variano and the State Policemen, that he had never given or received anything of value to or from any defendant in this case, and that he knew nothing about any of the facts of the alleged conspiracy (2540, 2556, 2557).

Mr. Malavarco testified to many arrests of gamblers associated with Variano (2487-2490) and said there were probably more of the same, which he would be able to recall if he were permitted to examine the records of arrests which he had made. The records of all gambling arrests made by Malavarco were subpoenaed, but the Government refused to produce them, and the trial court declined to order their production. Malavarco's counsel stated that his purpose in seeking these records was to prove Malavarco's diligence in pursuing and investigating Variano and his people as well as other major gamblers (718, 2110 *et seq.*, 2493-2495), and that he was investigating Variano when he was arrested. Both the court and the prosecutor stated upon the record that the Government would not contest these facts (2110 *et seq.*).

Mr. Malavarco testified that on each of the two days immediately before his arrest, on March 5, 1970, he advised his superiors, Captain Boland and Lt. O'Dell, that the Variano operation was moving into Hartsdale the following Monday. He said he had received information to that effect (2554).

Malavarco was charged with the duty of preparing a criminal intelligence summary twice each year, on July 15th and on January 15th. This document was prepared in five copies and its distribution included copies to the Superintendent of the State Police and to the Assistant Deputy Superintendent in command of the Bureau of Criminal Investigation. A portion of the July 15, 1969, Criminal Intelligence Summary and of the one for January 15, 1970, were received in evidence as Defendant Malavarco's Exhibits AC and AD (2543, 2544). Both exhibits disclose that Malavarco reported that Variano was actively operating as a gambler in Rockland County.

Mr. Malavarco testified about his activities in Mahopac (2489-2521). In 1968 he was sent to Mahopac by Major Monahan because the Major believed that the Brewster station was not doing its job. He arrested two persons named Messina and Clancy and received a commendation for those arrests. The second occasion when he worked in Mahopac was in 1969 and to the best of Mr. Malavarco's recollection was in the early part of 1969. Captain Boland and Lt. O'Dell asked Malavarco to assist the Bureau of Criminal Investigation at Brewster, in investigating what they believed to be a Variano operation operating in the Mahopac area. Malavarco checked certain registration numbers including that of one Curtis Pryor, and told Lt. O'Dell to advise Brewster that Curtis Pryor was a Variano sheet writer, and if anyone saw a car with his registration number they were immediately

to apply for a search warrant. Malavarco went to Mahopac and did surveillance there for three or four successive days and saw no activity, and failed to see Pryor. He advised Captain Boland of these facts, and Captain Boland said "it was Brewster's responsibility to suppress the gambling up there and since I (Malavarco) was only sent up there to assist them and not to spend all my time up there." Malavarco returned to his duties at Hawthorne.

There is not one drop of evidence in the record having any tendency to controvert in any way Malavarco's evidence as to his vigorous activities directed as against the Variano operation. As has been seen the Government obliged itself on the record not to controvert Malavarco's testimony on these matters. It is submitted that this uncontroverted evidence, as to various activities by Malavarco against Variano and his operation, establishes to a certainty that Malavarco had no agreement with or relationship to Variano of any kind.

Mr. Malavarco also testified that he knew nothing concerning anyone connected with this case travelling from New York to either Puerto Rico or New Jersey (2557). He said he never received anything of value from any defendant and never gave anything to any defendant. He said he never received anything from any person for any action or refraining from action relating to his duties as a State Police officer (2556, 2557).

It is useful at this point to explore some of the principles established by the decided cases.

In conspiracy cases where a federal crime (other than conspiracy itself) is not involved, it is necessary for the Government to prove that the defendant (1) directly

agreed that there should be interstate travel (2) or directly agreed to a scheme which could not be consummated without interstate travel (3) or directly agreed to a scheme in which it was known that the likelihood of interstate travel was great.

Twitchell v. United States, 313 F. 2d 425.

None of the conditions is met by the proof against Malavarco. As has been seen, there is no proof that he agreed to anything. The only proof having anything to do with interstate travel is the hearsay discussed in item 15 above, wherein Colligan said that Variano said that he had "contacted" Malavarco and "told" him to keep in touch with Sabbatini during the Puerto Rican trip. There is nothing in the record showing that Malavarco ever said or did anything in response to this alleged request. Malavarco was acquitted by the jury as to the Eighth Count, the substantive count dealing with Puerto Rico. He was not charged in any of the substantive counts dealing with travel to New Jersey and the Government made no attempt to show that Malavarco knew anything about travel to New Jersey.

Twitchell also holds that the degree of knowledge necessary to the proof concerning the interstate aspect increases as the defendant's connection with the core agreement becomes more tenuous.

Similar holdings on the requirements of proof as to the interstate element are:

United States v. Crimmins, 123 F. 2d 271;
United States v. Corallo, 413 F. 2d 1306.

The proof to sustain a charge of conspiracy requires at least the degree of criminal intent necessary to the

proof of the commission of the substantive crime claimed to be the purpose of the conspiracy.

Ingraham v. United States, 360 U. S. 672, 3 L. Ed. 2d 1503, 79 S. Ct. 1314.

The Supreme Court views with disfavor attempts to broaden the already pervasive and wide-sweeping nets of conspiracy prosecutions.

Grunewald v. United States, 353 U. S. 391, 77 S. Ct. 963, 1 L. Ed. 2d 931.

POINT VI.

Mr. Malavarco was entitled to a separate trial and his trial together with all the other defendants was fatally prejudicial, deprived him of a fair trial and of due process, and of his rights under the Sixth Amendment.

Mr. Malavarco's trial together with the other defendants in this case violated his right to a fair trial, and deprived him of due process, and violated his Sixth Amendment rights.

Bruton v. United States, 390 U. S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476;
United States ex rel. Floyd v. Wilkins, 367 F. 2d 990.

Because of the principles elucidated in Point I hereof all statements made by other defendants, out of the presence of the defendant, in furtherance of an alleged conspiracy among those defendants, do not bind the defendant Malavarco in any way. In law, so far as the defendant Malavarco was concerned, it is if there was no allegation of a conspiracy and no attempt to prove

a conspiracy. The only statements or admissions which would be admissible against him would be those which he himself physically uttered. The admission of the gigantic mass of hearsay utterances by Variano and others was a clear and direction violation of the principles enunciated in the above cited cases.

Bruton points out that accomplice testimony is by its very nature suspect. The Supreme Court then held that, "The unreliability of such evidence is intolerably compounded when the alleged accomplice, as here, does not testify, and cannot be tested by cross examination." It can be added that this unreliability is further compounded by the fact that when the accomplice does not take the stand, the other defendants do not even get the benefit of the charge that the jury must view the accomplice's testimony with suspicion.

In yet another respect those principles were violated. After Cassino's arrest, Cassino is alleged to have made an oral statement in which he quoted faithfully much, if not all, of the hearsay already testified to by Colligan. After an F.B.I. Agent testified to those portions which referred to Cassino, counsel for Rattenni and Roman were permitted to ask if their clients were anywhere mentioned in Cassino's post arrest statement. These questions were permitted over the objections of other counsel, including, of course, counsel for Malavarco (1988-2035).

It is axiomatic that a post arrest statement (necessarily made when the conspiracy is no longer in operation) is not admissible even as against co-conspirators. The question of whether Rattenni and Roman were mentioned in the alleged oral statement is not admissible for any purpose. Under some circumstances its admission would be harmless. Here, however, grave prejudice

resulted. Cassino did mention the other defendants, and since he was simply quoting Variano, he mentioned Malavarco. Therefore it was not possible for Malavarco's counsel to ask the same question which was asked by Rattenni and Roman. The implication was inescapable (and clearly did not escape the jury) that Mr. Malavarco was in fact mentioned in Cassino's alleged oral statement. Thus Cassino's post arrest statements was in fact used against Malavarco to his prejudice. The jury must, of necessity, have used Cassino's mention of Malavarco as corroboration of the feeble testimony of Colligan.

There is yet another respect in which Malavarco's trial jointly with the various other defendants, under an indictment containing many counts which do not mention Malavarco, was prejudicial.

In *United States v. Branker,* 395 F. 2d 881 (2nd Circuit 1968), the Court of Appeals found the joinder of persons similarly situated to the defendant Malavarco to have been fatally prejudicial to those persons. The court said as part of the holding:

> "This kind of prejudice is particularly injurious to defendants who are charged in only a few of the many counts, who are involved in only a small proportion of the evidence, and who are linked with only one or two of their co-defendants. The jury is subjected to weeks of trial dealing with dozens of incidents of criminal misconduct which do not involve these defendants in any way. As trial days go by the mounting proof of guilt of one is likely to affect another."

United States v. Geaney, 417 F. 2d 116, held that, where in a conspiracy case, the hearsay forms so large a portion of the proof that a cautionary instruction would be futile, the court should declare a mistrial.

United States v. Kelly, 349 F. 2d 720, held that where one defendant is not as deeply enmeshed as his co-defendants, a severance must be granted the moment it appears that he is likely to be prejudiced by the accumulation of evidence of wrongdoing by his co-defendants.

The courts in the above cases could as easily have been speaking of the defendant Malavarco as of the defendants there. The instant trial consumed almost a month: the record covers thousands of pages. The only references to Malavarco are the seventeen items mentioned in Point I and II above which consumed an infinitesimal part of this vast record. The indictment names twelve defendants and contains fourteen counts. The defendant Malavarco is named in only two, the first (conspiracy) and the eighth, which is the sole substantive count naming him. (The eighth count was dismissed by the jury as against Malavarco.) The only proof as to his connection with any alleged conspiracy consists of four non-incriminating conversations with one conspirator, Variano. It is a moral certainty that had Mr. Malavarco been tried separately he would have been acquitted of the conspiracy count as well as of the substantive count as to which the jury found him "not guilty."

The defendant Malavarco made a motion for a severance in advance of trial which was denied. All during the trial the matter of the misjoinder, and the prejudice resulting from the mass of hearsay evidence was kept prominently before the court both by Malavarco and the other defendants, and various motions for relief made.

POINT VII.

The trial court committed a number of errors during the charge to the jury which were fatally prejudicial to the defendant Malavarco.

(1) The court failed to marshal the evidence and failed to call to the attention of the jury that the evidence purporting to link Malavarco to the conspiracy was different, both in quantity and quality, from the evidence relating to the other defendants. The court said at the outset that it would make no comment upon the evidence (2895) and did in fact make no comment. In a case of this sort such omission is fatally prejudicial.

United States v. Kelly, 349 F. 2d 720, held that, where one defendant is less enmeshed in the conspiracy than the others, the court owes a duty to give interim instructions to the jury during trial, and instructions during the charge which make it very clear that the connection of the particular defendant is different from the others, to see that such a defendant is given separate and individual attention, and carefully to marshal the evidence so as to elucidate the differences. Failure so to do is error so prejudicial that it requires reversal even in the absence of objection by defense counsel.

A similar holding is presented in *United States v. Borelli,* 336 F. 2d 376, where it was held to be error not to focus the jury's attention upon the scope of the agreement of each defendant and to fail to direct the jury to find what each defendant's particular agreement was, and the period of time of each one in the scheme.

(2) The court charged emphatically that rudimentary gestures, without speech, serve as well as a voiced or expressed assent to joining a conspiracy (2995, 2999, 3001), and that much is left to the unexpressed understanding (2921). As to Malavarco, to whom no remarks are attributed in the entire record which deal with this conspiracy, such instructions are the essence of the prejudicial.

(3) The trial court in the course of explaining the duties of the jurors during deliberation and voting, related an instance of a recently concluded trial, in the same courthouse, in which one juror held out despite the disagreement of the other jurors, and refused to change his vote. The trial judge stated that that juror would, yet be dealt with by the court (2964-2966). It is submitted that this is a coercive instruction of the most prejudicial character.

(4) The defendant, Malavarco made the following request to charge in writing. (The same request was made by other defendants.)

Request No. 1.

Proof of Membership in Conspiracy.

"In this case there are no statements of an incriminating nature of any members of the conspiracy as charged given in testimony from the witness stand. The only evidence of this comes from the lips of law enforcement officers. These statements by law enforcement officers as to declarations of alleged co-conspirators, are binding only upon the declarant, that is the alleged conspirator who is being quoted. This, however, is not evidence of a substantive nature against any other defendant in the case.

"Participation of each defendant in the conspiracy must be established by independent proof based upon the reasonable inferences drawn from his own acts, his own conduct, his own statements or declarations, his connection with the acts and conduct of other alleged co-conspirators."

In a conference held pursuant to Rule 30 of the Rules of Criminal Procedure the trial court informed counsel that he granted the said charge, but would give the instruction in his own language. Counsel for Malavarco, in his summation, was careful to segregate hearsay and non-hearsay evidence one from the other, and to say to the jury that the court would in its charge acquaint the jury with the function of each. In the end the court refused to give the requested charge, either in the language requested, or in the court's own language. In fact the court charged the reverse (2925, 3000). There the court said "whether or not a defendant was a member of a conspiracy may be determined upon the reasonable inferences to be drawn from all the evidence in the case * * *."

It is submitted that this is not a correct statement of the law. It is true that once the trial court has made a determination that there is sufficient independent evidence to warrant the admission of hearsay evidence, all of the evidence must go to the jury. This question of admissibility is for the trial court alone, and it would be improper to charge the jury that they must again determine this question, and refrain from using the hearsay evidence until they have first weighed the sufficiency of the independent evidence.

But that does not say that the trial court is relieved of its duty to inform the jury of the appropriate and

peculiar function of each type of evidence contained in the entire record which it gives to the jury. It has been seen in Point I that agency of one defendant to speak for another can never be established by the out of court declarations of the speaking defendant. To use the graphic language of *Glasser v. United States*, 315 U. S. 60, 86 L. Ed. 680, "Otherwise hearsay would lift itself by its own bootstraps to the level of competent evidence." No matter whether the trier of the fact is a judge or jury, he or they must respect and obey the rule that an out of court declaration of an agent or alleged co-conspirator is not competent create the agency to speak or act for a principal or another alleged co-conspirator. The jury cannot be expected to obey and respect this rule as to competency unless the rule is explained to them. In the instant case they were left in complete ignorance of the rule by the trial court's charge.

In the case of Malavarco the omission is particularly prejudicial. All of the hearsay statements concerning him are mere narratives by Variano concerning alleged past events. None of the hearsay can be considered as a tool of the conspiracy—as an utterance or act in furtherance thereof. Therefor the jury was left with the understanding that they could consider all of Variano's narrative, out of court, statements on the question of whether Malavarco joined or did not join the alleged conspiracy.

(5) The court charged the jury at page 2927 as follows:

> "The big shot isn't going to tell everybody all the plans he's got, every bit of it in connection with the carrying out of the common objective. But that doesn't prevent another, the little fellow, even, from being declared a conspirator if he knew

> the objects of the conspiracy thereof * * * I don't think I need to expand upon it every time there is a conspiracy involving such personages, the captain doesn't call in the little fellow and tell him the details of each step that is going to be taken. The test is whether each one of them knows the aims of the conspiracy and participates therein to some extent."

The court continued in the same general vein on page 2928 and repeated the instruction at 3002 *et seq.* It is submitted that this portion of the charge violates the principles relating to the required proof as to the interstate aspects of a conspiracy already explored above.

> *Twitchell v. United States*, 313 F. 2d 425;
> *United States v. Crimmins*, 123 F. 2d 271;
> *United States v. Corallo*, 413 F. 2d 1306.

POINT VIII.

The erroneous submission of Count Eight to the jury of necessity influenced the jury in its deliberations on the Conspiracy Count and tainted those deliberations.

The sole evidence in the entire record offered by the Government to support the Eighth Count consists of item 15, discussed above, consisting entirely of the report of out of court declarations by Variano. The hearsay did not attribute to Malavarco the utterance of one word or the authorship of one deed. Therefore there was not even a hint of the basis for submitting to the jury this *substantive count.*

The submission of this totally unsubstantiated substantive count must of necessity have influenced the jury in their finding of guilty on the conspiracy count, tainted

their deliberations thereon, and requires a reversal of Malavarco's conviction on the Conspiracy Count.

United States v. Cantone, 426 F. 2d 902.

POINT IX.

Certain conduct on the part of the Government constituted error and requires reversal of the judgment of conviction.

(1) The Government in its bill of particulars, on its page 3 lists bribes alleged to have been given by certain defendants to Mr. Colligan. One of these items shows that Peter Variano gave Joseph F. Colligan on one occasion (1/2/70) "Suits and slacks valued at over one hundred dollars."

This item was incorrect in several very important particulars, and was known to the Government to be false when the bill of particulars was served.

The clothing were selected by Colligan and taken from a store known as B and G Clothiers. Variano paid for the clothing. A Mr. Borghese the owner of that store testified at the trial (2177-2196). He was unable to produce the sales slips because in March of 1971, Colligan and an F. B. I. agent came to his store and took with them the slips relating to the Colligan transactions. These slips were marked in evidence as defendant Rattenni's Exhibit "s," after they were produced from the prosecutor's file on the demand of that defendant's counsel.

Colligan, during his direct testimony, testified in substantial agreement with the bill of particulars, that Colligan received from B & G Clothiers a suit, a sport jacket

and three sets of trousers, all of which were included in Government's Exhibit "17." Mr. Borghese and Exhibit "S" disclosed that in addition to the items which Colligan admitted receiving, he received from B & G items paid for by Variano as follows: a suit valued at $130; a sport coat valued at $75; slacks valued at $32.95; and an overcoat valued at $160. The total value of items not mentioned by Colligan in his testimony and not included in Exhibit "17" is $397.95. The items were not purchased at one time as alleged in the bill of particulars, but on two separate occasions. The bill of particulars fails to mention the overcoat. The bill of particulars says valued at "over $100," when the true value of the total clothing Colligan received from Variano is $699.40.

The vice with the Government's position is this. It knew the true facts in March of 1971, before the service of the bill of particulars, and before it called Colligan to the stand, knowing in advance that he would testify falsely on this matter.

(2) Colligan received directly from Variano on Christmas Eve of 1969 a color television set. He failed to mention this fact as any part of his direct testimony. He also testified that on each and every occasion when he met Variano he was observed by his surveillance team. He was not observed by a surveillance team on December 24, 1969 (697-701).

The Government apparently did not know when Colligan first took the stand, that he intended to testify falsely on this matter. But after Colligan finished his direct testimony, he disclosed to the prosecutor the entire matter of the television set. The prosecutor advised the witness to testify to the matter of the television set if he was asked about it on cross examination (698, 732).

It is submitted that the prosecutor's duty was immediately to disclose this fact to defense counsel, or to ask leave to ask a few questions on a sort of supplemental direct examination, and bring out these facts from the witness himself.

This error was compounded by this additional circumstance. The prosecution called a Captain Dirschka who testified that Colligan had disclosed to him between Christmas, 1969 and New Years that Colligan had received the television set from Variano (1068 *et seq.*). This disclosure was made by Capt. Dirschka for the first time upon his recall to the stand after he had finished his testimony, and all counsel announced that they were finished examining him. He testified, however, that after he had finished testifying, and a few minutes before his recall to the stand, he had a conference with Colligan about the television set and his prospective testimony (1087).

Colligan had been directed by the trial court as follows:

"You are directed by me not to speak to any living human being anywhere, at any time, any other witnesses, including any other witnesses who may be called, about your testimony up to date and your testimony in the future. The only exception is your talking with the man in charge of the Government's case, and that is Mr. Hollman" (468).

It is, of course, obvious that Mr. Colligan deliberately violated the court's direction. It is equally obvious that the prosecutor knew of this violation, and deliberately took advantage of it, when he recalled Dirschka to the stand and asked him about the television set. Most notable is the fact that Colligan never claimed during his

testimony that he had ever during 1969 or 1970 discussed the matter of the television set with Dirschka.

(3) Colligan testified on direct that the defendant Roman made a statement to Variano and Colligan, "I forgot to tell the man that the Spaniards were not with us any more." On cross examination he admitted that what Roman really said was "I forgot to tell Edward McElroy * * *." When counsel sought to pursue this matter further the prosecutor said, "Your Honor, I limited Lt. Colligan's testimony solely to gambling concerning these defendants" (626-628). By this statement the prosecutor put his own credibility as a lawyer and a prosecutor behind this witness, and even worse the prestige of the United States Government. It would have been perfectly proper for Colligan to have said on cross that the prosecutor told him not to mention anyone but defendants, but he did not do so. On the contrary, from the very commencement of his testimony he made incriminating statements about a host of people who were not defendants. In any event such a direction by the prosecutor would have itself been improper. Most important Colligan was not guilty of omitting anything on direct. What he did was to testify affirmatively to the transaction, and testify falsely concerning it. It is submitted that the prosecutor's intrusion into the cross examination in this manner was grossly improper. This matter was discussed and argued in the record at pages 721-735, where counsel moved for a mistrial and the motion was denied.

(4) The defendant Rattenni called a witness named Masselli for the purpose of showing bias. He testified that, after the arrests in the instant case, at a State Police outing he was beaten by three state troopers (among whom were witnesses in this case) and that harsh

references were made to his being friendly with Malavarco, and to the fact that Masselli was of Italian extraction.

On cross examination the prosecutor asked Masselli if he had ever made a statement that Variano had given Malavarco a Cadillac automobile. Masselli vehemently denied ever having made such a statement. The prosecutor pursued this line with great vigor over objection by Malavarco's counsel, which was overruled by the court (2133-2158). In the first place this cross examination had not the smallest connection with the direct examination. Vastly more important, the prosecutor knew to a certainty that Variano never gave Malavarco a Cadillac (or anything else).

In Malavarco's pre-trial motion it was fully disclosed that Malavarco had purchased the Cadillac, and paid for it with his mother's check and that the money was largely the result of the settlement of a personal injury action by Malavarco. The prosecutor knew that this was a true statement, since investigators acting on his behalf had interviewed the Cadillac dealer 7 or 8 months before the trial (2458, 2459), and he had told them the true story, and showed them the documents establishing that Malavarco had purchased the car for himself. The indictment does not mention the Cadillac as an overt act or otherwise. The bill of particulars, in the section dealing with bribes, does not mention the Cadillac, or any other bribe or gift to Malavarco.

These facts establish two things (1) that the prosecutor knew that Malavarco had purchased the Cadillac with his own funds (2) that the Government did not contend, at the time of trial, that Variano ever purchased anything for, or gave anything to Malavarco, and so officially notified the defendants in the bill of particulars.

Deliberately to seek an answer on cross examination which the questioner knows to be false is bad faith, and is improper conduct for any lawyer. Doubly improper is it for a prosecutor, who is a quasi judicial officer. Even worse is the fact that the answer sought was totally antagonistic to the official stance of the Government as indelibly engraved in its bill of particulars.

It is true that Malavarco was able to establish by the automobile dealer, Martabano (2452-2459) and by Defendant's Exhibits "U" through "X," and by his own testimony (2554-2556) that he bought the Cadillac with his own money, honestly acquired. But the whole subject should not have been mentioned. Malavarco should not have been forced to defend himself before the jury on a matter concerning which the prosecutor knew his conduct was innocent. The mere mention of a new Cadillac automobile before a jury tends to prejudice that jury against a police officer being tried by that jury. It is submitted that it was only for the purpose of enlisting that very prejudice that the prosecutor raised the matter of the Cadillac. It is very difficult to conclude that the jury was not in fact prejudiced against Malavarco by the whole Cadillac business.

The error was compounded by the fact that the trial court overruled Malavarco's objection to this line of cross examination. Thus both the prosecutor and the court committed error, and the jury was impressed with the fact that the court approved of, and endorsed this kind of irresponsible and prejudicial cross examination.

Cases dealing with the standards applicable to the conduct of prosecutors and exploring the principles explored in this point are the following:

Giglio v. United States, 92 S. Ct. 763, 31 L. Ed. 2d 104;
Brady v. Maryland, 373 U. S. 88, 83 S. Ct. 1194, 10 L. Ed. 2d 215;
Berger v. United States, 295 U. S. 78, 55 S. Ct. 29, 79 L. Ed. 1314;
Harris v. United States, 402 F. 2d 656;
Taylor v. United States, 413 F. 2d 1095;
Johnson v. United States, 347 F. 2d 803;
Garris v. United States, 390 F. 2d 862;
Reichert v. United States, 359 F. 2d 278;
United States v. Jones, 433 F. 2d 1107;
People v. Savvides, 1 N. Y. 2d 554, 154 N. Y. S. 2d 885;
People v. Creasey, 236 N. Y. 205;
People v. Ahmed, 20 N. Y. 2d 958, 286 N. Y. S. 2d 850;
People v. Reynolds, 35 A. D. 2d 529, 313 N. Y. S. 2d 223.

Conclusion.

The Government failed to make a case either during the Government's case or at the close of the evidence. Therefor the conviction of Malavarco should be reversed and the indictment dismissed. In the event that a new trial is granted, it is submitted that Malavarco should be severed from the case against the other defendants and be granted a separate trial.

Respectfully submitted,

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Opinion of the United States Court of Appeals for the Second Circuit.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 910, 911, 912, 913, 914—September Term, 1971.

(Argued June 27, 1972 Decided August 11, 1972.)

Docket Nos. 72-1160, 72-1192, 72-1235, 72-1236, 72-1244

UNITED STATES OF AMERICA,

Appellee,

v.

CHARLES CASSINO, NICHOLAS RATTENNI, EUGENE CURICO, VINCENT MALAVARCO, and MICHAEL ROMAN,

Defendants-Appellants.

Before:

MOORE, SMITH, AND TIMBERS,

Circuit Judges.

Appeals from judgments of conviction entered by the United States District Court for the Southern District of New York, Irving Ben Cooper, *Judge,* after trial by jury for conspiracy to violate, and for substantive violations of the Travel Act, 18 U.S.C. § 1952 (1970).

Affirmed.

IRVING ANOLIK, New York, New York, *for Defendants-Appellants Charles Cassino and Michael Roman.*

ROY M. COHN, New York, New York (Saxe, Bacon & Bolan, New York, New York, Thomas A. Bolan and Michael Rosen, of counsel), *for Defendant-Appellant Nicholas Rattenni.*

WILLIAM SONENSHINE, Brooklyn, New York (Evseroff, Newman & Sonenshine, Brooklyn, New York), *for Defendant-Appellant Eugene Curico.*

MORTON N. WEKSTEIN, Yonkers, New York, *for Defendant-Appellant Vincent Malavarco.*

PETER F. RIENT, Assistant United States Attorney, New York, New York (Whitney North Seymour, Jr., United States Attorney for the Southern District of New York, Edward M. Shaw, Assistant United States Attorney, of counsel), *for Appellee.*

MOORE, *Circuit Judge:*

Charles Cassino, Nicholas Rattenni, Eugene Curico, Vincent Malavarco, and Michael Roman appeal from judgments of conviction entered in the United States District Court for the Southern District of New York after trial by jury before Judge Cooper. The five appellants, with seven others, were indicted on April 14, 1971, for conspiracy to violate, and substantive violations of the Travel Act.[1] Stated simply, the indictment charged the defen-

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1 *See* 18 U.S.C. §§ 371 (conspiracy), 1952 (interstate travel in aid of racketeering), and 2(a) (aiding and abetting) (1970). Section 1952 prohibits interstate travel with the intent to, *inter alia*, violate state gambling and bribery laws. The state gambling and bribery laws allegedly violated or intended to be violated are N.Y. Penal Law §§ 225.05 (promoting gambling), 225.10 (promoting gambling), 225.20 (possession of gambling records), 200.00 (bribery), 200.10 (bribe re-

dants with engaging in a concerted scheme to bribe New York State policemen in order to protect illegal gambling operations in New York from official interference. We affirm the appellants' convictions.

I.

The government's case rested upon the testimony of a senior investigator for the New York State Police, Joseph Colligan, and the agents who conducted surveillance of him and of the defendants. This testimony established the following case for the government.

A. *Roman Contacts Colligan*

During the afternoon of September 29, 1969, Colligan, who was assigned to the Stony Point State Police Station

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ceiving), 200.20 (rewarding official misconduct), 200.25 (receiving award for official misconduct), 200.30 (giving unlawful gratuities), 200.35 (receiving unlawful gratuities) (McKinney 1967).

The indictment was brought in fourteen counts against the appellants and Peter Variano, Ernest Lattanzio, Louis John Boggia, Louis Nicholas Sabbatini, Mannie Cohen, William Alter, and Albert Parietti. Count one charged the 12 defendants with conspiracy to commit offenses against the United States. Counts 2-14 charged the defendants with substantive violations of 18 U.S.C. §§ 2, 1952 (1970).

Variano entered a plea of guilty prior to trial to count one; he was sentenced to three years in prison. The prosecution of Sabbatini was severed prior to trial and subsequently dismissed. The charges against Lattanzio, Boggia, Cohen, and Parietti were dismissed during the trial. On November 24, 1971, the jury found Cassino and Curico guilty on counts 1 and 8 (18 U.S.C. §§ 1952, 2, N.Y. Penal Law § 225.05), Rattenni guilty on counts 1, 6 (18 U.S.C. §§ 1952, 2, N.Y. Penal Law §§ 200.00, 200.10, 200.20, 200.25, 200.30, 200.35), and 13 (18 U.S.C. §§ 1952, 2, N.Y. Penal Law § 225.05), Roman guilty on counts 1, 2 (18 U.S.C. §§ 1952, 2, N.Y. Penal Law §§ 200.00, 200.10, 200.20, 200.25, 200.30, 200.35), and 9 (18 U.S.C. §§ 1952, 2, N.Y. Penal Law § 225.05), Malavarco guilty on count 1 and not guilty on count 8, and Alter not guilty on count one.

Rattenni was sentenced to three years in prison and fined $30,000, Roman to two years in prison, Cassino and Curico to 18 months, and Malavarco to one year.

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in Rockland County, New York, received a telephone call from Albert Parietti. Parietti asked Colligan to meet with him later in the afternoon. Colligan agreed and the two met later in the day. Parietti asked Colligan if he would meet with Michael Roman to discuss gambling operations in Rockland County. Colligan replied that he would have to consider the matter. The next day Colligan informed his superior of the conversation with Parietti.

Colligan met with Roman on October 1, 1969. This meeting was under surveillance. During the meeting Roman told Colligan that he was "authorized" to pay Colligan $500 just for sitting down and talking. "He then went on," testified Colligan, "to say that his organization had authorized him to come to see me, to make me a proposition to offer me $500 per month to protect his organization's gambling places in Rockland County." [2]

The offer was not attractive to Colligan; he asked Roman to arrange a meeting with "his people" to discuss more lucrative offers. Roman agreed and promised Colligan that if he sat down with Roman and the "Number 1" man, he would be made an offer he could not resist.

Apprehensive about Colligan's loyalties, Roman asked him whether he was "wired" (wearing a recording device). Colligan replied no; Roman responded by stating ". . . well, what could I get out of it, six months, and then only if you could prove it." [3] Roman also was nervous about a gentleman sitting close by whom he believed to be one of Colligan's "people." Displaying considerable presence of mind, Colligan not only admitted this but also introduced the agent to Roman, telling the agent "Mike" was a friend of his. They then had a few drinks together.

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2 Transcript of Trial (Transcript) at 231.

3 *Id.* at 232.

B. *Colligan Meets Number 1*

On October 8, 1969, Colligan met with Roman and Number 1 in the parking lot of Christy's New Town House in Nyack, New York. Number 1 turned out to be Peter Variano, who was indicted with appellants but entered a plea of guilty prior to trial. Colligan got into Roman's car and the three drove for "a meal and some drinks" to the Las Vegas restaurant in Northvale, New Jersey. After telling Colligan that "[t]his meeting has been a long time in coming,"[4] Variano said that he had a "marriage" with several New York State policemen, naming appellants Cassino, Curico, and Malavarco. Cassino was a New York State police lieutenant and member of the New York State Joint Strike Force On Organized Crime, while Curico and Malavarco were senior investigators.

At the Las Vegas, Variano proposed to Colligan that for protection of his gambling operations in Rockland County Variano would pay $1000 per month plus fringe benefits—clothing, free trips to Las Vegas and Puerto Rico, a car, and free tickets to sports events. Colligan accepted the offer, and immediately thereafter Variano asked whether he could bring another bookmaking operation into Rockland County. Colligan responded favorably, at which point Variano told Roman to make a telephone call. While Roman was on the phone, Variano gave Colligan $1000 in hundred dollar bills. The new bookmaking operation was set up via the telephone call; Variano told Colligan that the two of them would split the proceeds from the operation and that they would probably each make $300 a week from it.

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4 *Id.* at 238.

C. *The Wednesday Meetings At the Las Vegas*

From October 8, 1969 until the end of February, 1970, Variano and Colligan met virtually every week, usually on Wednesday evenings and usually at the Las Vegas. These meetings, occasionally attended by appellant Rattenni, generally included discussions of different aspects of Variano's gambling operations and the roles played by the various members of the state police who were being paid to protect those operations. Variano invariably paid for the food and drinks consumed and periodically gave cash payments of $1000 to Colligan, as well as assorted gifts (e.g., tickets to sporting events, clothes, a vacation to Puerto Rico).

1. *The evidence of Rattenni's involvement.*

At the weekly meeting of October 22, 1969, Variano told Colligan something of his relationship with Rattenni.

> He [Variano] then went on, he said to me [Colligan], "People are always trying to—people are always trying to relate me as a partner of Nicholas Rattenni's . . . .
>
> . . . .
>
> He stated that this wasn't so, that Nick Rattenni was in the refuse business, and at times he fronted money for him, if he was hit hard on a gambling hit, that he would—if he needed $20,000, $25,000 on a Monday morning or any day where he is hit hard on his books, that the man would give him the money.[5]

At the meeting of November 19, 1969, Variano and Colligan were joined by Rattenni. During the evening Variano spoke of bringing a crap game into the county. Rattenni offered the following advice.

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5 *Id.* at 301.

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[Colligan]

A. Mr. Rattenni told Mr. Variano that you have to go slow, you can't go too fast in the business, you take it easy and if you ran the crap game right, ran it two nights a week, that would be worth more than his business phones were at the present time. . . .

. . . .

At this time Mr. Rattenni said to Mr. Variano that "You don't expose him, don't let him get the house, you let your bookkeeper get the house for you and this way you don't expose him at all," meaning myself. Mr. Variano agreed with Mr. Rattenni that this was—

. . . .

A. Mr. Variano stated to Mr. Rattenni that this was right, that he would have his bookkeeper get the house, and then Mr. Rattenni asked Mr. Variano what my part would be in the operation. Mr. Variano told Mr. Rattenni that I would protect the game for him on the nights it was in operation.

Q. What did Mr. Rattenni say, if anything?

A. Mr. Rattenni said that this was a good thing.[6]

Rattenni at this same meeting also aired his opinion of Cassino, Curico, and Malavarco. While he praised Malavarco and Curico (" . . . very good boy, did things without making noise. . . . very classy person . . . didn't make any noise when he did anything for you."),[7] he distrusted Cassino, believing him "too loud, ma[kes] too much noise, tr[ies] to be a big shot,"[8] and advised Variano to get rid of him.[9]

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6 *Id.* at 350-52.

7 *Id.* at 352-53.

8 *Id.* at 352.

9 Rattenni expressed his uneasiness about Cassino to Colligan on several other occasions. While Rattenni attempts to impugn the accuracy of one of these reported conversations, there is no doubt that Rattenni appears through Colligan's testimony to have been seriously concerned about the risk that Cassino would jeopardize Rattenni's freedom.

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In Rattenni's presence, Variano then gave Colligan copies of FBI search warrants in support of a raid in Nyack a month earlier, saying that he had asked Cassino to review them "with a fine tooth comb" with a view to contesting them in court, and asked Colligan to do the same.

At the December 1, 1969, meeting with Variano and Colligan, Rattenni mentioned an incident in which the FBI had returned an automobile to a bookmaker they had arrested and asked Colligan whether this was unusual. When Colligan replied that it was not unusual if there was too much money owed on the car, Rattenni said that the bookmaker had given a statement to the FBI, that the FBI was going to give him a new identity and move him to Virginia to work for them there, and that Variano "should get rid of this guy."[10]

On January 9, 1970, Rattenni was present when Colligan informed Variano that one Patsy Borgese was no longer the target of a Strike Force gambling investigation and when Variano told Colligan that he would make airline and hotel reservations for Colligan and his wife to go to Puerto Rico.

On February 4, 1970, Rattenni was present when Variano told Colligan, after paying him $1000 (not in Rattenni's presence): "I pay you, I don't know what you do with the money. I never ask you what you do with your money, I don't know whether you pay off one of your people or not, I never ask anyone what they do with it and I never pay anyone in front of anyone."[11]

2. *Further evidence of Cassino's, Curico's and Malavarco's involvement.*

During the meetings between them, Variano discussed in further detail with Colligan the services provided to his

10 Transcript at 373.
11 *Id.* at 491.

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operations by Cassino, Curico, and Malavarco. Variano said that Cassino was responsible for his being the number one bookmaker in the area and recounted the circumstances under which Cassino had helped him set up his bookmaking establishments in Rockland County. Variano also told Colligan that Cassino owned a bookmaking establishment himself, and worked at one of Variano's locations. In addition, Variano said that Cassino provided protection to Variano by warning of impending raids, by identifying and raiding Variano's competitors, by making stand-in arrests[12] for Variano, and by performing such sundry services as paying off other state policemen and scrutinizing FBI search warrants for defects.

As for the services provided by Malavarco and Curico, Variano told Colligan that he had requested Malavarco's permission to use certain phones in Westchester County, that Malavarco had investigated a competitor of Variano's at Variano's request, that he had asked Malavarco to stay in touch with Officer Sabbatini concerning gambling raids while Variano, Colligan, Cassino, and Curico went to Puerto Rico, and that Malavarco paid Sabbatini and Curico out of the money which he was paid by Variano. With respect to Curico, Variano told Colligan only that Curico was paid $100 a week by Malavarco out of the money that Variano paid Malavarco.

During the period that Colligan was meeting with Variano, surveillance was conducted of the appellants. Cassino, Curico, and Malavarco were each seen on several occasions with Variano. For example, Malavarco was seen meeting with Variano in Variano's car near Malavarco's home on three occasions during December, 1969 and February, 1970, and once in December, 1969, in the men's room of a restaurant.

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12 Stand-in arrests are arrests of people paid to be arrested to give the illusion that the gambling laws are being enforced.

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On November 26, 1969, Variano gave Colligan a Westchester County telephone number which he said belonged to Harry Creighton, a policy operator who was competing with him in the Orangeburg area of Rockland County, and asked Colligan to forward the number to Malavarco so that Malavarco could do something about Creighton. Variano also suggested that Colligan ask Malavarco who Variano was and predicted that Malavarco would demonstrate his loyalty to Variano by saying that he was a small time bookmaker who was no longer in business. Colligan telephoned Malavarco the next day, gave him Creighton's number and asked him to investigate it. Malavarco said he would do so and, in response to Colligan's inquiry as to who Variano was, said "some people say he is a bookmaker, some people say he is a big bookmaker, some people say he is a small bookmaker, some people say he operates strictly in Rockland County, but he [Malavarco] never hears of him in Westchester County," [13] even though Variano had estimated that 80% of his business was in Westchester County.

D. *The Puerto Rican Trip*

In late January, 1970, Colligan, Cassino, and Curico spent several days in Puerto Rico as Variano's guests. Cassino and Curico stayed at the same hotel where Variano was staying, were taken to dinner and a show by Variano on two occasions, and were frequently seen in his company. During the Puerto Rican trip, Curico told Colligan that he had been accepting "meals, drinks and stuff" from Variano for nine months. In Curico's presence, Cassino told Colligan that he paid Sabbatini $100 a month for "information that [Sabbatini] was giving out on gambling to Vincent Malavarco." [14] Also in Curico's presence, Cassino warned

13 Transcript at 372.

14 *Id.* at 478.

Colligan to be careful of Lieutenant Dirschka, his superior, who had "almost caught me [Cassino] by accident at one time." [15]

On February 25, 1970, about a month after the Puerto Rican trip, Variano told Colligan in Rattenni's presence that there were rumors circulating to the effect that Colligan, Cassino, and two others had been in Puerto Rico with a bookmaker. Colligan met with Cassino and Curico the same day to tailor their stories, and it was decided that he and Cassino would admit having been in Puerto Rico but that Curico would deny it.

E. *Cassino, Curico, and Malavarco Are Arrested*

Colligan's investigation ended on March 5, 1970, with the arrests of Cassino, Curico, Malavarco and others. After his arrest, Cassino confessed his involvement with Variano's gambling enterprises, admitted having furnished Variano with the name of a Strike Force target and having made stand-in arrests for Variano, and admitted that Variano had paid for his trip to Puerto Rico as well as giving him clothes and tickets to sporting events. Curico, in his post-arrest statement, initially claimed that he had never met Variano but then admitted having met him on numerous occasions over the past five or six years. Curico at first denied having taken a trip to Puerto Rico, but then admitted that he had gone there under an assumed name and had seen Variano and had drinks with him there. Malavarco, when asked about Variano after his arrest, denied having met with Variano on the four occasions when the two men were seen together by surveilling agents, or on any other occasion.

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15 *Id.* at 480.

II. Asserted Grounds for Reversal

A. *Sufficiency of the Evidence*

All appellants contend that the evidence was insufficient to submit the charges against them to the jury and/or that the evidence is insufficient to sustain their convictions.

A multi-defendant trial involving a criminal conspiracy count and related substantive counts almost always presents serious legal problems both for the trial judge and counsel. The case, of necessity, must be unfolded through the testimony of one or more witnesses—and in narrative form. Upon appeal the record must be considered as a whole. More likely than not the facts will be developed chronologically. In admitting testimony, the trial judge is confronted with two seemingly conflicting principles (1) hearsay declarations of co-conspirators are admissible; (2) hearsay declarations are not admissible until a conspiracy has been established. But in real life, conspiracies are not so easily identified. It would be a rare case in which the conspirators assembled together and planned to bribe State officers. The law has taken cognizance that conspiracies are not so born. It permits inferences of their existence to be drawn from the conduct and speech of the actors. Just as a complicated brief cannot be written in one sentence, neither can events covering a substantial period of time be disclosed in a single answer. For this reason the trial judge is forced to anticipate the future and accept testimony "subject to connection." This necessitous practice leads to the question: has it been connected? In a long trial it is frequently impossible to point to any definite nexus. The trial judge has to decide whether a conspiracy has been established and whether hearsay has been properly admitted upon that supposition. The appellate court is able to view the record as a unit and has the advantage

of reading the completed testimony—an advantage which the trial judge did not have in ruling upon each question and answer as the case was unrolled.

Under these standards of review we conclude that the evidence is sufficient to support the appellants' convictions.[16] Of this there can be no question as to Cassino, Curico, or Roman. Rattenni contends that the evidence of his "stake" [17] in the conspiracy is insufficient to warrant a finding of participation. We disagree. Colligan's testimony as to what Rattenni had told him in their various meetings was sufficient to warrant a reasonable conclusion that there "was a working relationship between the two men," [18] and that Rattenni was associated with the venture to protect Variano's gambling operations from official interference and sought to make it succeed.[19] His thorough knowledge of Variano's operations, his advice as to how to run those operations, and his concern about the loyalties of the officers on Variano's payroll permit the reasonable conclusion that Rattenni was more than a "drinking companion" [20]

16 *See United States* v. *Geaney*, 417 F.2d 1116, 1120 (2d Cir. 1969), *cert. denied*, 397 U.S. 1028 (1970).

17 ". . . he [the alleged conspirator] must in some sense promote their venture himself, make it his own, have a stake in its outcome." *United States* v. *Falcone*, 109 F.2d 579, 581 (2d Cir.), *aff'd*, 311 U.S. 205 (1940) (L. Hand, *J.*).

18 *United States* v. *Peltz*, 433 F.2d 48, 51 (2d Cir. 1970), *cert. denied*, 401 U.S. 955 (1971). *See also id.*: ". . . it is unnecessary to a conspiracy that the relationship contemplated mutual benefit, ..."

19 *See Pereira* v. *United States*, 347 U.S. 1, 9-11 (1954); *Nye & Nissen* v. *United States*, 336 U.S. 613, 618-20 (1949), *quoting* Learned Hand in *United States* v. *Peoni*, 100 F.2d 401, 402 (2d Cir. 1938): "In order to aid and abet another to commit a crime it is necessary that a defendant 'in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed.'"

20 "What the record does show is a clear picture of Rattenni as an outsider, a drinking associate, a gossiper, who was not a participant in, nor one who furthered, the conspiracy." Reply Brief for Appellant Rattenni at 7.

of Variano. While the evidence independent of the declarations of co-conspirators as to Malavarco's participation in the conspiracy is not overwhelming, it is sufficient. His response to Colligan's telephone inquiry of November 27, 1969, concerning Variano, and particularly his rather unusual meetings with Variano (three times at early morning hours in Variano's car and once in the men's room of a restaurant), unreported and denied upon arrest, permit the reasonable conclusion that Malavarco was a member of the conspiracy.[21]

Similarly the jury could have found on all the evidence that the appellants committed the crimes charged beyond a reasonable doubt. Again as to Cassino, Curico, and Roman there can be no doubt. The independent evidence of Rattenni's association with the conspiracy, and Variano's statement of October 22, 1969, that Rattenni would stake him $20,000 to $25,000 whenever he needed it, permit the conclusion that Rattenni was a member of the conspiracy.

Rattenni contends that there is no direct evidence establishing that on February 4, 1970, he travelled *from New York* to New Jersey (where the Las Vegas Restaurant is located), thereby vitiating his conviction on the substan-

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21 *See United States* v. *Calabro*, 449 F.2d 885, 890 (2d Cir. 1971), *cert. denied*, 405 U.S. 928 (1972):

> It is true that almost every aspect of Calabro's conduct is susceptible of an inference other than his participation in the conspiracy. However, as Judge Friendly observed in United States v. Geaney, *supra*, 417 F.2d at 1121, "Pieces of evidence must be viewed not in isolation but in conjunction." A seemingly innocent act, when viewed in the context of surrounding circumstances, may justify an inference of complicity.

That the evidence of Malavarco's complicity is circumstantial is not fatal to the establishment of this complicity. *United States* v. *Ragland*, 375 F.2d 471, 477, 478 (2d Cir. 1967), *cert. denied*, 390 U.S. 925 (1968). *See Holland* v. *United States*, 348 U.S. 121, 140 (1954); *United States* v. *Bowles*, 428 F.2d 592, 597 (2d Cir.), *cert. denied*, 400 U.S. 928 (1970).

tive counts charging violations of the Travel Act. But the jury could have concluded on the basis of circumstantial evidence that in fact Variano and Rattenni came from New York for the meeting: with the exception of the Las Vegas meetings, every time Colligan saw Rattenni they were in New York; Variano's operations were shown to be in New York and on each of the three occasions when Rattenni joined Colligan and Variano for dinner at the Las Vegas he arrived with Variano; and after the February 11, 1970 meeting all three men drove back to New York.[22]

Finally, Variano's and Rattenni's declarations as to Malavarco's participation in the conspiracy are clearly sufficient to sustain the jury's conclusion as to his guilt on the conspiracy count.

B. *Judge Cooper's Charge and Conduct of the Trial*

1. *The charge.*

Appellants raise several objections to Judge Cooper's charge and supplemental charge to the jury. Most were not objected to below and are plainly without merit. We consider here only two of the objections: first, that Judge Cooper's explanation of the evidence sufficient to establish the existence of a conspiracy was prejudicial to the defendants; and second, that the charge coerced guilty verdicts from the jury.

The jury after deliberating for some time requested further instructions from Judge Cooper on the elements necessary to prove a conspiracy. In further explaining the nature of the proof minimally necessary to establish an unlawful agreement Judge Cooper said:

> To establish a conspiracy the government is not required to show that two or more persons sat around a

22 *See* note 21 *supra*.

table and then entered into a solemn pact orally or in writing stating that they have formed a conspiracy to violate the law and setting forth details of the plan like an architect's blueprint. It would be extraordinary if ever such a situation existed.

Your common sense will tell you that when men in fact undertake to enter into a criminal conspiracy, much is left to the unexpressed understanding. You could nod your head, that's the same as saying, "Okay with me," or you could say, "I would very much like to be considered as taking under advisement the possibility that I shall entertain your proposition, and having done so I am ready to participate." That's an elongated form of just the affirmance by a nod of the head.[23]

Considering this language in context,[24] we conclude that it was not prejudicial to the appellants. In explaining the difficult concept of conspiracy to the jury, Judge Cooper discussed at length the proposition that actions often speak louder than words and that a specific, tangible agreement in words is not necessary to establish the existence of a conspiracy. The charge in this respect was fair and properly responsive to the jury's request.[25]

Appellants also object to portions of the charge and supplemental charge they believe were coercive.

In his charge Judge Cooper said:

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23 Transcript at 2995.

24 *See United States* v. *Kahaner*, 317 F.2d 459, 479 (2d Cir.), *cert. denied*, 375 U.S. 836 (1963).

25 *See United States* v. *Jacobs*, 431 F.2d 754, 760-62 (2d Cir. 1970), *cert. denied*, 402 U.S. 950 (1971), where we approved Judge Cooper's charge and supplemental charge on conspiracy against a similar attack as "in all respects fair and proper." *Id.* at 762. *See* Transcript of Trial at 1129, 1132-33, 1195-96, 1206-07, *id.*

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The verdict, whether for acquitted [sic] or for conviction, must be unanimous. Each juror is entitled to his own opinion. You should, however, exchange views with your fellow jurors. That is the very purpose of jury deliberation, 12 jurors, not one.

I heard not long ago that a juror in a case in this building went into the jury room and with arms akimbo said, "This is how I feel and that's it and I don't want to listen to you." And the jury worked on that person for hours.

That wasn't Mr. Justice, that was Mr. Fool. That was the most irresponsible, degrading piece of conduct. That person will be dealt with, as he should.

You have a right to your opinion but you must discuss with one another, you must give each the benefit of your views.

And so the law says that you must listen to the arguments of your fellow jurors, you must consult with one another, you must reach an agreement based solely and wholly on the evidence, if you can do so without violence to your own individual judgment, and to employ that high degree of genuine courage you justifiably expect especially in these perilous times from your public officials.

You should not hesitate to change an opinion which upon a consideration of all the evidence with your fellow jurors appears erroneous. However, if after carefully considering all the evidence and the arguments of your fellow jurors you entertain a conscientious view that differs from others, you are not to yield your convictions simply because you are outnumbered or outweighed.[26]

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26 Transcript at 2964-65.

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The appellants all stress the "Mr. Fool" illustration. Although hypothetical illustrations should be avoided because of the likelihood that they may divert the jury, this particular illustration, which well could have been omitted, was not coercive. It was followed immediately by a correct exposition of the law applicable to each juror in his discussions and in the weighing of the evidence in the jury room. Considered in context this instruction was not prejudicial to the defendants. The jury was "properly instructed that each juror's vote must reflect his considered judgment as to how the case is to be decided";[27] no more is required.

During the afternoon of November 24, 1971, the jury became trapped in a stalled elevator for approximately one and one-half hours. In speaking to the jury afterwards, Judge Cooper asked them whether they wished to continue deliberations; the jury members concluded thereafter that they did. During this session Judge Cooper said:

> Won't you, therefore, take your time when you go back to the jury room, let me have a note as to how you feel about going on? Certainly the case has to be resolved, certainly we have to figure a way whereby you can resolve it calmly, dispassionately, fairly, remembering what is involved here to both sides, and with that in mind we will cooperate to the fullest extent.[28]

Counsel later objected to this comment in the robing room. Judge Cooper agreed with the objection, and recharged the

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27 *United States* v. *Bowles*, 428 F.2d 592, 595 (2d Cir.), *cert. denied*, 400 U.S. 928 (1970). *See United States* v. *Martinez*, 446 F.2d 119 (2d Cir.), *cert. denied*, 404 U.S. 944 (1971); *United States* v. *Hyan*, 424 F.2d 754 (2d Cir.), *cert. denied*, 299 U.S. 933 (1970).

28 Transcript at 3041.

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jury.[29] Thus whatever coercive effect there was in the first comment was effectively eliminated in the recharge.

2. *Judge Cooper's limitation of cross examination.*

Appellant Cassino claims that he was denied due process by Judge Cooper's limitation of his cross examination of the agent who took his post-arrest confession. Agent Sullivan testified on direct examination to Cassino's post-arrest admissions of his knowledge of and participation in Variano's gambling enterprises. Counsel for Cassino then cross examined Sullivan, bringing out the facts that Cassino was surprised to be arrested, that Cassino had re-

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29 The Court: Members of the jury, it is now about 5:10 and I am most anxious to make it extremely clear to you, as clear as I can possibly make anything clear, that what I said to you about a half hour or so ago in no way, not in any sense whatever, is to run counter to what I pleaded with you, as a judge to a jury, when I concluded yesterday with these words—in other words, what I am about to read to you is what I told you yesterday and it is as true and as vibrant and as full of life and as full of meaning as it was when I uttered it for the first time in this trial: You have a right to your opinion but you must discuss with one another, you must give each the benefit of your views. And so the law says you must listen to the arguments of your fellow jurors, you must consult with one another, you must reach agreement based solely and wholly on the evidence, if you can do so without violence to your own individual judgment and to employ that high degree of genuine courage you justifiably expect, especially in these perilous times, from your public officials, and that includes the judges and the lawyers. You should not hesitate to change an opinion which upon a consideration of all the evidence with your fellow jurors appears erroneous. However, if after carefully considering all the evidence and the arguments of your fellow jurors you entertain a conscientious view that differs from others, you are not to yield your convictions simply because you are outnumbered or outweighed. And of course this instruction applies to each defendant on trial, because you remember I said over and over again that guilt is personal [sic] and the guilt or innocence of each defendant must be determined by you as though he were the only one on trial.

Id. at 3061-62.

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fused to sign a waiver of rights form,[30] that Cassino had participated in a raid on one of Variano's establishments in October of 1969, and that Sullivan's interview log did not mention Cassino's confession. Cassino's attorney also tried to suggest that Cassino had been joking when he said that he worked for Variano.

After Cassino's attorney completed his cross examination of Sullivan, the question arose of how to deal with the desire of three of the defendants on trial to bring out the fact that Cassino's confession did not name them. The court resolved this difficulty by permitting the three unnamed defendants to elicit the fact of Cassino's silence as to them without revealing the identities of any defendants named by Cassino. Cassino's attorney then stated that he wanted to "bring out the confession word for word" to "rehabilitate" his client, claiming that portions of the confession exculpated Cassino. Pointing out that counsel had already completed his cross examination, during which he had a copy of Cassino's confession, the court rejected his request to cross examine further with respect to the confession, but did give him permission to cross examine further with respect to other areas.

Thus Judge Cooper did not abuse his discretion in limiting Cassino's right to further cross examine Agent Sullivan, particularly in light of Cassino's failure to indicate

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30 Before he confessed Cassino was twice advised of his rights, and stated that he understood them. Thus his signature on a waiver form was not necessary to permit the introduction of his confession into evidence. *United States* v. *Speaks*, 453 F.2d 966, 968-69 (1st Cir. 1971), *cert. denied*, — U.S. — (1972) (40 U.S.L.W. 3503); *United States* v. *Crisp*, 435 F.2d 354, 358 (7th Cir. 1970), *cert. denied*, 402 U.S. 947 (1971); *United States* v. *McNeil*, 443 F.2d 1109, 1113 (D.C. Cir. 1969); *Klinger* v. *United States*, 409 F.2d 299, 308 (8th Cir.), *cert. denied*, 396 U.S. 859 (1969); *United States* v. *Hayes*, 385 F.2d 375, 377 (4th Cir. 1967), *cert. denied*, 390 U.S. 1006 (1968). *See United States* v. *Welch*, 455 F.2d 211, 213 (2d Cir. 1972) *(per curiam)*.

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what further questions he would like to have put to Agent Sullivan.[31] Judge Cooper obviously had to carefully limit the questioning of Agent Sullivan,[32] and under the circumstances he was completely fair to Cassino's counsel.

C. *Alleged Improper Conduct By the Prosecutor*

One of the many gifts made to Colligan by Variano was a color television set. Colligan claimed that when given the set by Variano he believed it not to be a gift but a purchase, and fully intended to pay Variano for it. The day after receiving the set Colligan told his superior about the incident. Lieutenant Dirschka instructed Colligan to keep the set in his home in case any of the principals in the investigation visited him there. He did not mention the incident in his reports because he felt at the time that the transaction was a purchase rather than a fringe benefit for protecting Variano's gambling operations.

The prosecutor did not elicit from Colligan the story about the television set, which he discovered just prior to the completion of Colligan's direct examination. He explained his decision as follows:

> I had a discussion with Lieutenant Colligan as to whether or not we had everything he received from Variano set forth before the jury. He said yes, everything he had received in the way of what he considered a bribe or a gift was set forth. However, he then went on to relate to me the story about a television set

31 *See United States* v. *Campbell*, 426 F.2d 547, 550 (2d Cir. 1970); *United States* v. *Persico*, 425 F.2d 1375, 1383-84 (2d Cir.), *cert. denied*, 400 U.S. 869 (1970); *United States* v. *Gorman*, 355 F.2d 151, 160-61 (2d Cir. 1965), *cert. denied*, 384 U.S. 1024 (1966); *Commercial Banking Corp.* v. *Martel*, 123 F.2d 846, 847 (2d Cir. 1941).

32 *See Bruton* v. *United States*, 391 U.S. 123 (1968).

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yesterday, long after I prepared any bill of particulars with regard to this.

I said, "Undoubtedly this will come out on cross examination and as soon as you are asked one question as to whether you got any gifts whatsoever in this regard, you make it known there is a television set involved and you explain the circumstances of what you consider a purchase and what counsel may consider to be otherwise." [33]

The decision not to elicit the story about the television set was, as the government concedes in its brief, unwise,[34] but it was not misconduct prejudicial to the defendants. They fully exploited the incident on cross examination. Thus even assuming the story of the set to be material evidence, and even assuming the government's suppression of the story deliberate (a questionable assumption), the fact that the jury learned the details of the story precludes a successful challenge. As the Supreme Court said in *Giglio*: "A new trial is required if 'the false testimony could . . . in any reasonable likelihood have affected the judgment of the jury.'" [35] Here clearly the "false testimony" would not in any reasonable likelihood have affected the judgment of the jury.

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33 Transcript at 732.

34 *See United States* v. *Freeman*, 302 F.2d 347, 350 (2d Cir. 1962), *cert. denied*, 375 U.S. 958 (1963).

35 *Giglio* v. *United States*, 405 U.S. 150, 154 (1972), *quoting Napue* v. *Illinois*, 360 U.S. 264, 271 (1959); *United States* v. *Mele*, —— F.2d ——, —— (2d Cir. 1972) (September Term, 1971, slip ops. 3527, 3538) ("At least where the suppression is deliberate, the defendants need only show that the evidence is material and could in any reasonable likelihood have led to a different result on retrial."). *See United States* v. *Mayersohn*, 452 F.2d 521, 525-26 (2d Cir. 1971); *United States* v. *Freeman*, 302 F.2d 347, 350 (2d Cir. 1962), *cert. denied*, 375 U.S. 958 (1963).

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Ratteni further complains that one of Colligan's reports had to be "smoked out by the defendants." The report was a comprehensive report covering Colligan's entire investigation. This report was in essence a compilation of the individual reports Colligan made after each meeting with the defendants. These individual reports were turned over to the defendants prior to the completion of Colligan's direct testimony. Because the prosecutor was previously unaware of the existence of the compilation, it was not turned over to the defense until a portion of Colligan's cross examination had been completed. Because the report was used by several of defense counsel in cross examination, and because the failure to turn over the report was clearly inadvertent, this alleged suppression likewise does not warrant a new trial.[36]

D. *Appellants' Motions To Sever*

Appellants Roman, Curico, and Malavarco contend that their trials should have been severed from the trial below. We disagree. Trial judges possess broad discretion in granting motions to sever pursuant to Fed. R. Crim. P. 14;[37] that discretion was not abused here. Each of the

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36 *See* note 35 *supra*.

Rattenni and Malavarco further complain that the prosecutor knowingly permitted Colligan to testify that he received clothes of less value than he allegedly in fact received. Again, even assuming the suppression to be knowing, the fact that the evidence allegedly establishing that Colligan received more in clothing from Variano than he testified to was placed before the jury by defense counsel vitiates whatever force this complaint has.

37 *Schaffer* v. *United States*, 362 U.S. 511, 513 (1960); *Stilson* v. *United States*, 250 U.S. 583, 585-86 (1919); *United States* v. *Projansky*, —— F.2d ——, —— (2d Cir. 1972) (September Term, 1971, slip ops. 3665, 3694); *United States* v. *Vega*, 458 F.2d 1234, 1236 (2d Cir. 1972); *United States* v. *Borelli*, 435 F.2d 500, 502 (2d Cir. 1970), *cert. denied*, 401 U.S. 946 (1971); *United States* v. *DeSapio*, 435 F.2d 272, 280 (2d Cir. 1970), *cert. denied*, 402 U.S. 999 (1971).

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appellants was shown to have participated in a common criminal scheme and no prejudice resulted from their joint trial.[38] That they might have had a better chance of acquittal by being separately tried is plainly insufficient to justify severance.[39]

Malavarco contends that severance should have been granted to him after Agent Sullivan testified as to Cassino's confession. Counsel for Roman, Rattenni, and Parietti brought out from Agent Sullivan the fact that Cassino did not mention their clients in his confession, but did mention other defendants. Malavarco contends that the jury must have inferred that he was one of the other defendants mentioned in Cassino's confession. Judge Cooper promptly and carefully instructed the jury not to speculate as to the "other defendants" mentioned by Cassino.

We conclude that the limiting instructions were sufficient under the circumstances to protect Malavarco's *Bruton* rights and that severance was properly denied. In determining whether a co-defendant's *Bruton* rights are violated in situations analogous to the one before us, courts have interpreted *Bruton* to require reversal only if (1) the testimony concerning the complaining co

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38 "Reasons for severance are founded on the principle that evidence against one person may not be used against a codefendant whose crime is unrelated to the others." *Schaffer* v. *United States*, 362 U.S. 511, 523 (1960) (Douglas, *J.*, dissenting).

39 *United States* v. *Fantuzzi*, —— F.2d ——, —— (2d Cir. 1972) (September Term, 1971, slip ops. 4023, 4030-31); *United States* v. *Borelli*, 435 F.2d 500, 502 (2d Cir. 1970), *cert. denied*, 401 U.S. 946 (1971); *United States* v. *DeSapio*, 435 F.2d 272, 280 (2d Cir. 1970), *cert. denied*, 402 U.S. 999 (1971), *quoting Tillman* v. *United States*, 406 F.2d 930, 935 (5th Cir.), *vacated as to one defendant on other grounds*, 395 U.S. 830 (1969).

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defendant is clearly inculpatory,[40] and (2) the testimony is vitally important to the government's case.[41]

Malavarco's contention meets neither test: while the jury might have inferred that one of the "other defendants" mentioned by Agent Sullivan was Malavarco, the jury did not necessarily or even probably have to conclude that the reference was inculpatory since both Cassino and Malavarco were state troopers, and Cassino might have mentioned Malavarco's name only in that context; moreover, the inference that Malavarco was one of the "other defendants" and the further inference that the reference was inculpatory were not vital to the government's case against Malavarco, given the evidence of Malavarco's guilt provided by the declarations of Variano and Rattenni and the testimony of the agents who conducted surveillance of Malavarco.

We have considered the other grounds urged for reversal and conclude that they are without merit and do not require discussion. The judgments of conviction are affirmed.

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40 *United States* v. *Deutsch*, 451 F.2d 98, 116 (2d Cir. 1971), *cert. denied*, 404 U.S. 1019 (1972); *United States* v. *Trudo*, 449 F.2d 649, 651-53 (2d Cir. 1971), *cert. denied*, 405 U.S. 926 (1972); *United States* v. *Cunningham*, 446 F.2d 194, 198-200 (2d Cir.), *cert. denied*, 404 U.S. 950 (1971); *United States ex rel. Nelson* v. *Follette*, 430 F.2d 1055, 1057 (2d Cir. 1970), *cert. denied*, 401 U.S. 917 (1971); *United States* v. *Cusumano*, 429 F.2d 378, 381 (2d Cir.), *cert. denied*, 400 U.S. 830 (1970); *United States* v. *Persico*, 425 F.2d 1375, 1382-83 (2d Cir.), *cert. denied*, 400 U.S. 869 (1970); *United States* v. *Carella*, 411 F.2d 729, 732 (2d Cir.), *cert. denied*, 396 U.S. 860 (1969). *See Bruton* v. *United States*, 391 U.S. 123, 126, 135-36 (1968).

41 *Frazier* v. *Cupp*, 394 U.S. 731, 735 (1969); *Bruton* v. *United States*, 391 U.S. 123, 126, 135-36 (1968); *United States ex rel. Duff* v. *Zelker*, 452 F.2d 1009, 1010 (2d Cir. 1971); *United States ex rel. Nelson* v. *Follette*, 430 F.2d 1055, 1058-59 (2d Cir. 1970), *cert. denied*, 401 U.S. 917 (1971); *Wapnick* v. *United States*, 406 F.2d 741, 742-43 (2d Cir. 1969) (*per curiam*).

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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-408

VINCENT MALAVARCO, PETITIONER

v.

UNITED STATES OF AMERICA

No. 72-566

EUGENE CURICO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Malavarco Pet. App. 81-105) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on August 11, 1972. The petition for a writ of certiorari in No. 72-408 was filed on September 9, 1972. On September 11, 1972, Mr. Justice Marshall extended

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the time within which the petition in No. 72–566 could be filed until October 10, 1972, and the petition was filed on October 7, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether hearsay statements of co-conspirators were properly admitted against petitioners.

2. Whether the evidence was sufficient to support petitioner Malavarco's conviction.

3. Whether the trial court properly exercised its discretion in denying petitioners' motions for severance.

4. Whether evidence that petitioner Curico failed to answer two questions during post-arrest interrogation violated his privilege against self-incrimination.

STATEMENT

After a jury trial with others [1] in the United States District Court for the Southern District of New York, petitioners were convicted of conspiracy to violate 18 U.S.C. 1952 (interstate travel in aid of racketeering). Petitioner Curico was also convicted of a violation of Section 1952. Malavarco was sentenced to a one-year

[1] Petitioners were two of twelve defendants indicted in fourteen counts. Defendant Variano entered a plea of guilty to the conspiracy count prior to trial; defendant Sabbatini, a state policeman, was severed prior to trial, and his case was later dismissed; defendants Cassino, Rattenni and Roman were convicted on the conspiracy count and on various substantive counts; defendant Alter was acquitted; and the jury did not consider the cases of the other defendants. Certiorari petitions have also been filed by defendants Rattenni (72–816) and Cassino and Roman (72–820).

term of imprisonment; Curico was sentenced to concurrent eighteen month prison terms. The court of appeals affirmed in a thorough opinion.

The evidence, which is fully detailed in the opinion below (Malavarco Pet. App. 83–92), showed that in October 1969 New York State police officer Joseph Colligan was contacted by an associate of Peter Variano for the purpose of setting up a meeting to discuss Variano's gambling operations in Rockland County. Colligan informed his superiors of this contact and, with their approval, eventually met with Variano. Variano told Colligan that he had a "marriage" with several state policemen, including petitioners and co-defendant Charles Cassino. Variano added that over the last year he had asked petitioners to "get to" Colligan for Variano with reference to his gambling operation, but they had refused to do so, saying that Colligan was an erratic person who might do something foolish (Tr. 209, 222–232, 237–238, 260–262, 707). Variano informed Colligan that he operated on both sides of the Hudson River and that twenty percent of his business was done on the west side, in Orange and Rockland Counties (Tr. 290, 330–331). Variano furnished Colligan with the locations and telephone numbers of his gambling establishments, so that Colligan would be able to protect them (Tr. 287, 337–338, 405, 434–435, 536–537; G.X. 25).

On November 19, 1969, Variano, Colligan and co-defendant Rattenni met to discuss various problems. One subject was other state policemen who were providing protection. During this conversation, Variano

stated that petitioners and Cassino took care of state policeman Sabbatini "moneywise" (Tr. 352). Rattenni said that Malavarco was "a very good boy [who] did things without making any noise," and he described Curico as "a very classy person [who] didn't make any noise when he did anything for you" (Tr. 352–353). Variano told Colligan that he had requested Malavarco's permission to use certain telephones in Westchester County (Tr. 330–331)[2]; that Malavarco had investigated a competitor of Variano's at Variano's request (Tr. 364–365, 374)[3]; that he had asked Malavarco to stay in touch with Sabbatini concerning gambling raids while Variano, Colligan, Cassino, and petitioner Curico went to Puerto Rico (Tr. 448–449, 470–471); and that petitioner Malavarco paid petitioner Curico and Sabbatini out of the money that he was paid by Variano (Tr. 470–471, 498).

During the course of Colligan's undercover investigation, surveillance was conducted of his meetings with Variano and of the activities of petitioners. Petitioner Malavarco was seen meeting with Variano in Variano's car near petitioner's home on three occasions during December 1969 and February 1970 (Tr. 1270–1277) and once, in December 1969, in the men's room of a restaurant (Tr. 1591–1592).

On November 26, 1969, Variano gave Colligan a Westchester County telephone number that he said

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[2] This was prior to the period covered by the indictment.

[3] On December 1, 1969, after hearing from Variano that Malavarco had been successful in an investigation of one of Variano's competitors, Rattenni said in Colligan's presence: "See, I told you you can trust this kid" (Tr. 374).

belonged to Harry Creighton, a policy operator who was competing with him in the Orangeburg area of Rockland County. He asked Colligan to forward the number to petitioner Malavarco so that he could do something about Creighton. Variano also suggested that Colligan ask Malavarco who Variano was and predicted that Malavarco would demonstrate his loyalty to Variano by saying that he was a small time bookmaker who was no longer in business (Tr. 364–365). Colligan telephoned Malavarco the next day, gave him Creighton's number, and asked him to investigate it. Malavarco said he would do so and, in response to Colligan's inquiry as to who Variano was, said "some people say he is a bookmaker, some people say he is a big bookmaker, some people say he operates strictly in Rockland County, but he [Malavarco] never heard of him in Westchester County" (Tr. 372). On December 1, 1969, Colligan reported his conversation with Malavarco to Variano and Rattenni and was informed by Variano that Malavarco had been successful in his investigation of Creighton (Tr. 374). Malavarco himself told Colligan on January 15, 1970, that he had just arrested Creighton for bookmaking (Tr. 445).

In late January 1970, Colligan, Cassino, and petitioner Curico spent several days in Puerto Rico as Variano's guests. Cassino and petitioner Curico stayed at the same hotel where Variano was staying, were taken to dinner and a show by Variano on two occasions, and were frequently seen in his company (Tr. 446, 474–477, 480–481, 486, 1633–1644). During this

trip petitioner Curico told Colligan that he had been accepting "meals, drinks and stuff" from Variano for nine months (Tr. 475). In Curico's presence, Cassino told Colligan that he paid Sabbatini $100 a month for "information that [Sabbatini] was giving out on gambling to Vincent Malavarco" (Tr. 478). Also in petitioner Curico's presence, Cassino told Colligan that the Spanish policy operation in Haverstraw, New York "used to be with us, but they are not with us any more" (Tr. 478–480).

Colligan's investigation ended on March 5, 1970, with the arrests of petitioners, Cassino and others. After his arrest, Cassino confessed to his involvement in Variano's gambling enterprises. When, after his arrest, petitioner Malavarco was asked about Variano, he denied having met Variano on the four occasions when the two men were seen together by surveilling agents, or on any other occasion (Tr. 1613–1619). At trial, Malavarco admitted being with Variano on the four occasions testified to by government witnesses but denied that the meetings were prearranged and claimed that his conversations with Variano were innocent and that he had told Variano to leave him alone (Tr. 2530, 2534, 2540).[4] Malavarco admitted, however, that he had not reported these meetings to his superiors (Tr. 2575–2576). Malavarco also denied having received money or gifts from another defend-

[4] Petitioner testified that at the first meeting Variano asked if he was still mad at him. At the second meeting, according to petitioner, Variano asked him: "Did a friend of yours see you to say hello?" Petitioner testified that at the third meeting he told Variano to stay away from him (Tr. 2536–2549).

ant or having taken part in any corruption (Tr. 2556–2557).

In his testimony, petitioner Curico denied that he had agreed with Variano to violate his public trust for money or that he had accepted bribes from anyone to protect gambling establishments. With respect to Puerto Rico, he claimed that he paid his own expenses and had not known that Variano would be staying at the same hotel. Curico also denied having told Colligan that he was getting "free drinks and food and stuff" (Tr. 2326, 2331–2334, 2338–2343). Curico admitted, however, that he had not told his superiors that he had been with Variano in Puerto Rico or that he had seen Variano at a restaurant in Nyack, New York, on December 29, 1969, and conceded that he had told Colligan and Cassino that he would deny having been to Puerto Rico if questioned (Tr. 2358–2359, 2366–2367, 2437).

ARGUMENT

1. Petitioner Malavarco contends (Pet. 13–63) that hearsay declarations by co-conspirators were improperly admitted against him, since there was no independent evidence linking him to the conspiracy, and that the evidence was insufficient to support his conviction. Whether evidence, independent of hearsay statements, is sufficient to show a defendant's participation in a conspiracy is to be determined under the "fair preponderance" test, not the "beyond a reasonable doubt" standard. *United States* v. *Geaney,* 417 F. 2d 1116, 1119–1120 (C.A. 2), certiorari denied *sub nom. Lynch* v. *United States,* 397 U.S. 1028; *United*

States v. *Calabro,* 449 F. 2d 885, 889–891 (C.A. 2), certiorari denied, 404 U.S. 1047. The independent evidence of Malavarco's involvement with Variano's operation was more than sufficient to meet the "fair preponderance" test for establishing his membership in the conspiracy and justified the admission of his co-conspirators' declarations. As we have described in the Statement, the evidence showed that Malavarco, a state policeman, met furtively with Variano on at least four occasions during the course of the conspiracy—once in the men's room of a restaurant and three times in the early morning in Variano's car (Tr. 1270–1277, 1591–1592). In addition, when Colligan asked Malavarco about Variano, he gave substantially the false exculpatory answer which Variano had predicted.[5] Finally, when he was arrested, Malavarco falsely denied knowing Variano or having met with him despite the four occasions when they were seen together (Tr. 1613–1619). This independent proof of Malavarco's participation in the conspiracy was sufficient to warrant the admission against him of Variano's and Rattenni's statements set forth above. See *United States* v. *Calabro, supra.*

Petitioner Curico, citing *Morello* v. *United States,* 250 F. 2d 631 (C.A. 2), and *United States* v. *DeSapio,* 435 F. 2d 272 (C.A. 2), certiorari denied, 402 U.S. 999, contends that Colligan was incompetent to testify as to hearsay statements linking Curico to the con-

[5] Malavarco said that Variano was reputed to be bookmaker in Rockland County, but that he never heard of him in Westchester County (Tr. 372) where, according to Variano's estimate, 80% of his business was done (Tr. 290, 330–331).

spiracy because Colligan was not a co-conspirator. However, Colligan's testimony was clearly admissible since he testified not to his own declarations but to what other co-conspirators said and did in his presence. *Morello* and *DeSapio* are thus inapposite, since they involved situations where a non-conspirator testified to his own declarations.

2. Despite petitioner Malavarco's contention, there was ample proof, as outlined above, to support his conviction.[6] Malavarco maintains, however, that the court of appeals adopted the wrong standard in upholding the sufficiency of the evidence by not applying the rule that, where the government's evidence is wholly circumstantial, it must be such that every reasonable hypothesis other than that of guilt is excluded. In *Holland* v. *United States,* 348 U.S. 121, 139–140, this Court held that formulation inappropriate for a jury instruction. It is even less appropriate as a standard of appellate review, where the record is examined "not for the purpose of weighing the evid-

[6] The proof of Malavarco's knowledge that the conspiracy contemplated interstate or foreign travel was also sufficient. Before going to Puerto Rico, Variano asked Malavarco to "mind the store" (Tr. 448–449). The jury could properly infer that Variano explained to Malavarco that he wanted him to keep an eye on things because he did not want to have his places of business raided while he was away. It is a fair inference that he agreed to Variano's request, since Variano actually made the trip with Colligan, Cassino and petitioner Curico. It is also fair to conclude that Malavarco knew that Colligan's trip was a "fringe benefit" for protecting Variano's gambling establishments and that one reason why Variano and Colligan were going to Puerto Rico was to discuss Variano's operations and the problems involved in protecting them.

ence but only to ascertain whether there was some competent and substantial evidence before the jury fairly tending to sustain the verdict." *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 154. See, *e.g.*, *Dirring* v. *United States*, 328 F. 2d 512 (C.A 1), certiorari denied, 377 U.S. 1003; *United States* v. *Aadal*, 368 F. 2d 962 (C.A. 2), certiorari denied, 386 U.S. 970; *United States* v. *Boyle*, 402 F. 2d 757 (C.A. 3), certiorari denied, 394 U.S. 934.

3. Both petitioners maintain that the trial court erred in failing to grant their motions for severance. However, the grant of a motion for severance under Rule 14 is committed to the sound discretion of the trial court, and denial of such a motion will not be overturned on appeal unless there is an affirmative showing of abuse of discretion. *Opper* v. *United States*, 348 U.S. 84, 95; *Tillman* v. *United States*, 406 F. 2d 930, 934–935 (C.A. 5), vacated on other grounds, 395 U.S. 830; *Gordon* v. *United States*, 438 F. 2d 858, 878–879 (C.A. 5), certiorari denied, 404 U.S. 828. There was no abuse of discretion here. Petitioners and their co-defendants were shown to have participated in a common criminal scheme, and no prejudice resulted from their joint trial. That petitioners might have had a better chance of acquittal by being separately tried is not sufficient to justify a severance.[7] *United States* v. *Borelli*, 435 F. 2d 500, 502 (C.A. 2), certiorari denied, 401 U.S. 946; *United States* v. *DeSapio*, 435 F. 2d 272, 280 (C.A. 2), certiorari denied, 402 U.S. 999.

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[7] Petitioner Malavarco was acquitted on the substantive count.

Petitioner Malavarco contends, however, that his case should have been severed after Agent Sullivan testified to Cassino's confession. He relies for this proposition on *Bruton* v. *United States,* 391 U.S. 123.[8] On direct examination, Sullivan testified to post-arrest admissions by Cassino, without stating that Cassino had mentioned anyone other than Variano (who was not on trial). Counsel were then given copies of Sullivan's report concerning Cassino's confession (G.X. 80 for identification), following which the attorneys for three defendants (not petitioners) stated their intention to bring out on cross-examination the fact that Cassino had not mentioned their clients in his confession (Tr. 1952–1953). After a lengthy discussion between the court and counsel (Tr. 1952–1955, 1990–2019), these defendants were permitted to elicit the desired testimony from Sullivan without referring to defendants who were mentioned in Cassino's confession (Tr. 1997–1998, 2018, 2022–2023, 2026–2027). One attorney went further and elicited from Sullivan the fact that, although his client was not mentioned by Cassino, other defendants were (Tr. 2024–2025).

[8] Petitioner's additional assertion that the admission of hearsay statements *ipso facto* violates his right to confront the witnesses against him is without merit. Since the statements were made in furtherance of the conspiracy, their admission does not violate the Confrontation Clause of the Sixth Amendment. See *Dutton* v. *Evans*, 400 U.S. 74; *United States* v. *American Radiator and Standard Sanitary Corp.*, 433 F. 2d 174, 194 (C.A. 3), certiorari denied, 401 U.S. 948; *Campbell* v. *United States*, 415 F. 2d 356, 357 (C.A. 6).

As the court of appeals noted (Malavarco Pet. App. 104–105), while the jury might have inferred that one of the other defendants mentioned by Sullivan was Malavarco, the jury did not "necessarily or even probably" have to conclude that the reference was inculpatory, since both Cassino and petitioner were state troopers, and Cassino might have mentioned petitioner's name only in that context. Further, as the court noted, the inference that petitioner was one of the other defendants and the further inference that the reference was inculpatory were not vital to the government's case against petitioner. The evidence of petitioner's guilt provided by the declarations of Variano and Rattenni and the testimony of the agents who conducted the surveillance of petitioner was more than ample to obviate the need for a severance on *Bruton* grounds, when set against the limited effect and speculative nature of the adverse inference that the jury might have drawn. See *Schneble* v. *Florida*, 405 U.S. 427. Moreover, the trial court promptly and carefully instructed the jury not to speculate concerning the mention of other defendants in Cassino's confession (Tr. 2028–3030).

Petitioner Curico contends that he was entitled to a severance because Cassino's confession implied that Variano had paid for Curico's trip to Puerto Rico. However, Agent Sullivan testified only that when Cassino was asked who paid for Cassino's trip, he replied that Variano had (Tr. 1908).

4. Petitioner Curico's contention that the admission of evidence that he failed to answer two questions put

to him during post-arrest interrogation violated his privilege against self-incrimination is without merit, since there is no basis for concluding that he was invoking his privilege when he failed to answer. Petitioner, a police officer, was fully aware of his right to remain silent. However, he voluntarily chose not to exercise that right and he answered all questions but these two, which sought details on exculpatory assertions petitioner was making (see Curico Pet. 10–11). When he gave no answer to these two questions he did not say that he wanted to exercise his privilege; he simply said nothing. Moreover, Curico later testified at trial that he answered all the questions put to him by the agent (Tr. 2323, 2441).[9] There was no prejudicial error in allowing the investigating agent's answers to stand.

5. Petitioner Malavarco's contention that the trial court's supplemental charge was coercive is fully answered by the opinion of the court below, on which we rely (Malavarco Pet. App. 96–98). Both petitioners also allege that the prosecutor committed prejudicial error in not bringing out on direct examination of Colligan that he had accepted a color television set from Variano. As the court of appeals pointed out (Pet. App. 102), while this may have been "unwise" it was not prejudicial. The matter was gone into on cross-examination, and the jury was fully apprised of the details of this transaction.

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[9] Petitioner Curico's attorney dwelt upon Curico's willingness to answer questions in his cross-examination of the agent (Tr. 1689–1693, 1698–1699).

CONCLUSION

It is therefore respectfully submitted that the petitions for writs of certiorari should be denied.

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JANUARY 1973.

U.S. GOVERNMENT PRINTING OFFICE: 1973

COPY

SUPREME COURT, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-408

VINCENT MALAVARCO,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

REPLY BRIEF OF PETITIONER VINCENT MALAVARCO

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On page 7 of the respondent's brief reliance is placed upon *United States* v. *Geaney,* 417 F. 2d 1116 (U.S.C.A. 2d Circuit) and *United States* v. *Calabro,* 449 F. 2d 885 (U.S. C.A. 2d Circuit) for the proposition that the threshold test for admission into evidence of hearsay testimony is the existence of independent proof of complicity sufficient to meet the "fair preponderance" test. Both cases hold that for submission of the case to the jury, there must be a greater measure of proof than the one applicable to admissibility. How much greater is not made clear. It is now made abundantly clear in the late Second Circuit case

of *United States* v. *Taylor,* 464 F. 2d 240 (Argued June 7, 1972; decided July 6, 1972).

In *Taylor* the Court rejected the rule of the Second Circuit which had prevailed there since the decision of *United States* v. *Feinberg,* 140 F. 2d 592, cert. den. 322 U. S. 726. The rule of *Feinberg* was that the standard of evidence necessary for the judge to send a case to the jury is the same for both civil and criminal cases, to wit, a fair preponderance of the evidence. In *Taylor* the Court of Appeals for the Second Circuit finally laid to rest the *Feinberg* rule, and held that in the Second Circuit, as elsewhere, in a criminal case there must be proof of guilt beyond a reasonable doubt before a case can be given to the jury.

Petitioner complains not only of errors relating to admissibility, but of the error of failing to dismiss the indictment, and of submitting the case to the jury. The opinion of the Court of Appeals held that the evidence of Malavarco's membership in the conspiracy is "not overwhelming". The brief of the respondent on this petition urges only that there is proof by a "fair preponderance". No one urges that there is proof of Malavarco's complicity in the conspiracy is proven beyond a reasonable doubt. The rule which now exists in the Second Circuit under *Taylor* requires that Malavarco's guilt be proven beyond a reasonable doubt. It has been seen that it is not shown that Malavarco performed one act or uttered one word in furtherance of the conspiracy. The only conceivable pathway, then, to a finding of guilt, is proof that Malavarco joined or became a member of the conspiracy. That proof must lie in the independent evidence (non-hearsay). As this Court held in *Glasser* v. *United States,* 315 U. S. 60, 86 L. Ed. 680 "Otherwise hearsay would lift itself by its own bootstraps to the level of competent evidence".

The Court of Appeals did not find, and the respondent does not maintain here, that there is independent evidence of Malavarco's membership in the conspiracy which satisfies the test of "beyond a reasonable doubt".

CONCLUSION

The Petition should be granted to petitioner Malavarco (No. 72-408).

Respectfully submitted,

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